CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH,

DECEMBER TERM, 1850.

JOHN RAY *vs.* MALCOLM RAY.

An appeal will not lie to the Superior Court, from the decision of the County Court, on a petition, by an alleged lunatic, to have the verdict of an inquest in his case set aside, and the guardian appointed in pursuance thereof removed.

The case of *Willis* v. *Davis*, 5 Ire. 14, cited and approved.

Appeal from the Superior Court of Law of Cumberland County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

The plaintiff in this case filed his petition in Cumberland County Court, at March Term 1849, alleging, that, at the instance of the defendant, the said Court, at March Term of 1848, passed an order directing a jury to inquire

whether or not the plaintiff was a lunatic: that at June Term 1848 the jury returned a verdict finding that the plaintiff was a lunatic; whereupon the Court appointed the defendant guardian to the plaintiff. The plaintiff, in his petition alleges, that he was not then, nor is he now, a lunatic, and prays the Court to set aside the former order, directing an inquest, the verdict returned thereon and the appointment of the defendant as his guardian.—The defendant answered, and the Court, at June Term 1849, ordered the following issue to be made up, "Is the petitioner, John Ray, a lunatic or not." The jury found that John Ray was not a lunatic. "Whereupon it is adjudged by the Court, that the traverse of the verdict of the former jury, mentioned in complainant's petition, is sustained; and it is further adjudged, upon the finding of the jury, now empannelled in the cause, that John Ray is *compos mentis*, and that the order appointing a guardian is rescinded." From this judgment the defendant obtained an appeal to the Superior Court of Law.

In the Superior Court, on motion of the petitioner's counsel to dismiss the appeal for want of jurisdiction, the Court orders that the appeal be dismissed. From this order the defendant appealed to the Supreme Court.

Banks, for the plaintiff.

No counsel for the defendant.

Pearson, J. There is no error in the record. The guardian of the lunatic had no right of appeal from the Judgment of the County Court. The question is settled, *Willis* v. *Davis*, 5 Ire. 14.

Per Curiam. Judgment affirmed.

JONATHAN OSBORNE vs. WILLIAM HORNER.

One, who has only a verbal authority to sell a slave can transfer the title by a sale and actual delivery.

Appeal from the Superior Court of Law of Granville County, at the Fall Term 1850, his Honor Judge MANLY presiding.

This case was an action of trover, in which damages, for the conversion of a slave named Esther, were demanded. It appeared that the slave had belonged to the defendant, and was loaned by him to his daughter, upon her intermarriage with one Joseph M. Hicks. The said Hicks afterwards sold the slave to the plaintiff, having an oral authority only from Horner to do so, and at the same time gave him a bill of sale, receiving the consideration money, and delivering the slave pursuant to the bill of sale. The conversion was admitted. Upon this state of the facts, the Court was of opinion, that the plaintiff had not acquired a title to the slave, and could not therefore recover, and so instructed the jury. The plaintiff's counsel asked his Honor to charge the jury, that if they believed Hicks had oral authority from the defendant to sell and deliver the slave, and that the authority was unrevoked at the time of the sale, and the sale and delivery were made by virtue of the authority, the fact that the said Hicks, the witness, executed a bill of sale in his own name, did not affect the plaintiff's title; which the Court declined giving.

There was a verdict for the defendant. Rule for a new trial discharged; and an appeal.

Gilliam and Lanier, for the plaintiff.
McRae, for the defendant.

Pearson, J. An agent, having a verbal authority to sell a slave, does sell and deliver the slave and receive the purchase money, and at the same time, executes a bill of sale, under seal with warranty, in his own name, without any reference to the principal; does the title of the slave pass to the purchaser? The Judge in the Court below held, that it did not. In this, we think, there is error.

His opinion, we presume from the argument made in this Court, was influenced by the suggestion that, as there was a bill of sale executed by the agent at the same time, the title could not pass by the sale and delivery, and as the bill of sale was not binding upon the principal, the title did not pass in either way.

The proper view of the question, as it seems to us, is this: The principal says the bill of sale is inoperative, so far as he is concerned, because the agent was not authorised to bind him by a *deed*. That is true, and therefore, it has no effect whatever, except so far as it may subject the agent upon his covenant of warranty. But it has no effect in reference to these parties. So the transaction is left as a mere sale and delivery of a slave, by one having a verbal authority to sell. Such a sale is valid.

Per Curiam. Judgment reversed and a *venire de novo* issued.

NEILL CURRIE *vs.* SAMUEL SWINDALL.

Where an action is brought by a plaintiff to recover the amount of a reward offered by the defendant, for the apprehension and delivery in jail of an individual charged with a criminal offence, it is incumbent on the plaintiff to prove that he either compelled the individual by force, or induced him by persuasion, to make the surrender.

If the surrender of such individual was wholly voluntary, although the plaintiff accompanied him to the jail and saw him lodged there, he has no right of action.

Where an agent is authorised to offer a reward for the apprehension of an individual, it is only necessary to prove that this was done—the mode of doing it is entirely immaterial.

Appeal from the Superior Court of Law of Bladen County, at a Special Term in December 1850, his Honor Judge DICK presiding.

This was an action of assumpsit, brought to recover the sum of one hundred dollars, which, it was alleged, the defendant had offered to give any one, who would apprehend and commit to prison, a certain person of color, named Chavis, charged with homicide.

The plaintiff proved by a Mr. McNeil, that the defendant requested him (the witness) to offer a reward of one hundred dollars in his (the defendant's) name to any person, who would apprehend and commit to jail the said Chavis: that the defendant did not direct in what manner the reward should be offered, whether by written advertisement or by publication in a newspaper: that he (the witness) wrote to the Editor of the "Fayetteville Observer," and the purport of what he had written was

(here the defendant's counsel objected, that the witness could not speak of what he had written to the Editor without producing the letter or accounting for its absence, but the Court permitted him to proceed) contained in the newspaper then before the Court, dated Nov. 20th, 1848. The plaintiff then introduced the jailor of the County, who proved, that the plaintiff came to his house on the Saturday night before the trial of the culprit, distant from the jail about two hundred yards, and told him he wished him to go to the jail: that he accordingly went, and found there Chavis and a man by the name of Smith with him: that the said Chavis was not confined in any way, and upon the jailor's opening the door, the plaintiff told Chavis to go in, which he accordingly did.

It was in proof, that Chavis was tried the week following the Saturday night of his going into custody, being the Spring Term 1849, of Bladen Superior Court of Law. It was also in proof, that the culprit Chavis was in the employment of the plaintiff, at the time of the homicide. The defendant offered to prove, that he was in the employment of the plaintiff after his trial, but this latter evidence was objected to and excluded by the Court.

There was no proof, that the plaintiff made any effort to arrest the culprit, nor was there any proof of his having arrested him, but that before stated.

The defendant contended, among other things, that the plaintiff had not, in fact, apprehended the culprit, but that he had intended to come in of himself, and the plaintiff being aware of it, merely accompanied him to claim the reward; and this, it was insisted, was inferable from the facts, that it was just the Saturday night before his trial that the culprit came in: that he came untrammelled: that there was no show of force or constraint upon him: that he had been in the employment of the plaintiff at the time of the homicide; and that no proof had been offered of any act of arrest by the plaintiff, or even of his having

searched for the offender. And the defendant's counsel prayed the Court to instruct the jury, that if they believed the culprit had come in of his own accord, and although the plaintiff may have accompanied him, yet if it was not in consequence of any force or persuasion used by the plaintiff, the plaintiff was not entitled to recover.

The Court refused to give the instruction prayed for, but told the jury, that it was not necessary for the plaintiff to have brought Chavis to jail by force to enable him to recover, but if he had induced Chavis to come to jail by persuasion and promises of assistance, it would be the same as if he had used force. The only evidence, how Chavis got in jail, was the evidence of the jailor, and they must decide upon that, whether the plaintiff had brought Chavis and put him in jail, and, if they found for the plaintiff on this point, and also found, that the defendant had authorised McNeil to offer the reward, as stated by McNeil, then the plaintiff was entitled to recover: and there was no evidence calling for such instructions as the defendant's counsel had asked for. A verdict being rendered for the plaintiff, and a rule for a new trial discharged, the defendant appealed.

W. Winslow, for the plaintiff.

Strange and McDougald, for the defendant.

Pearson, J. There is error in the refusal to give the instruction prayed for, and in the manner in which the case was left to the jury.

The instruction concedes, that the plaintiff is entitled to recover, if the person accused surrendered himself, in consequence of either force or persuasion used by the plaintiff; but it asserts, that if the man surrendered himself of his own accord, the plaintiff is not entitled to recover. There can be no question of the truth of the proposition asserted; for, if the man surrendered himself of

his own accord, without any force or persuasion on the part of the plaintiff, then he has not performed the services for which the reward was offered. Indeed, his Honor does not deny the proposition, but refuses "to give the instruction;" and after reciting what the defendant had conceded, "that it was not necessary for the plaintiff to have brought the man to jail by force, but if he had induced him to come to jail by persuasion and promises of assistance, it would be the same as if he had used force," he proceeds to instruct the jury, "that the only evidence, how the man got in jail, was the testimony of the jailor, and they must decide upon that, whether the plaintiff had brought and put him in jail;" and puts his refusal to instruct the jury, as prayed for, on the ground, that there was no evidence to raise the question.

There is error in thus narrowing down the case, and, in effect, deciding it. The man is in jail—he was induced to come either by force or persuasion used by the plaintiff, or he came of his own accord. There is no evidence, that he came of his own accord—*ergo*, he came by force or persuasion used by the plaintiff.

There is no evidence that the plaintiff had used force to apprehend the man. The testimony of the jailor, although not inconsistent with the idea, that the plaintiff had, by persuasion, induced the man to surrender himself, was, by no means, conclusive of the fact, and did not exclude the idea, that he had surrendered himself of his own accord. So, the fact, that the surrender was made on Saturday night before Court, was consistent with either view of the case. The same may be said of the other fact, that the man was in the plaintiff's employment at the time of the homicide. And it seems to us, that there was nearly, if not quite as much, ground for instructing the jury, that there was no evidence that the surrender was made in consequence of persuasion used by the plaintiff, as for the instruction, that there was no evidence

that the man surrendered himself of his own accord.—That enquiry ought to have been submitted to the jury, with instructions, that the burthen of proof was on the plaintiff; and, in the absence of any proof of an act done or words used by him, tending to induce the man to surrender himself, if the jury could not satisfy themselves how the fact was, they should find for the defendant.

There is no error upon the question, relative to the letter of McNeil to the Editor of the "Observer." It was not necessary to prove its contents. It was sufficient to prove, that the defendant had authorised McNeil to offer the reward, and that it was offered. The mode, in which McNeil procured it to be done, was wholly immaterial.

As to the other question, it is only necessary to say, that, in a case depending on well balanced circumstances, the fact, that the man after his acquittal went to work with the plaintiff, might have had some weight on one side or the other; and in a case of circumstantial evidence, the facts following, as well as those which precede, and those which accompany the act, are sometimes important.

PER CURIAM. There must be a *venire de novo*.

ALEXANDER D. McRAE *vs.* DANIEL D. McRAE.

A. died leaving three children, of whom B., the defendant, was the guardian, and who had slaves left to them by will by C. to the amount of upwards of six hundred dollars. B. gave to D. the plaintiff, a bond, executed on the 4th of February, 1846, of the following purport: "I promise to pay D. three hundred and sixty dollars, being in consideration of money which he paid for A. and his heirs, which sum I am to pay when it can be raised out of the estate left to them by the will of C." The writ was issued nearly three years after the date of the bond.

Held, that the true construction of this bond is, not that the payment should be delayed, until the guardian could raise the amount out of the hire and profits of the property, but that it should be made as soon as the guardian could, by proper proceedings, raise the money by the sale of the property, and that this could have been done within less than three years.

Appeal from the Superior Court of Law of Richmond County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

This was an action of debt upon a bond, of which the following is a copy: "With interest from date, I promise to pay to Alexander D. McRae the sum of three hundred and sixty dollars, being in consideration of money, which he paid for Hugh D. McRae and his heirs, which sum I am to pay, when it can be raised out of estate left to them by the will of Daniel McRae, their father. In witness whereof, &c., dated 4th of February 1846, and executed by Daniel D. McRae."

The defence relied on was, that the bond showed upon its face, that it was payable upon a condition precedent, which had not been performed.

The plaintiff produced in evidence the will of Daniel McRae, dec'd, in which was the following clause: "I give

and bequeath to my son, Alexander McRae, for the sole and separate use and benefit of my son Hugh McRae, in trust, the following slaves, viz.: Ehloe, and her child Hannah, Sam, Abram and Dinah, together with their future increase; also, I give and bequeath the one half of the tracts of land, whereon I now live, containing seven hundred and fifty acres, for the sole and separate use of my son Hugh McRae, during his natural life, and at his death to his heirs forever." He then proved, that Hugh McRae, mentioned in the said clause, had died, leaving three children, to whom the defendant had been regularly appointed guardian; and that two of the slaves mentioned in the clause aforesaid, were worth about six hundred dollars. The writ was issued on the 15th day of January 1849, nearly three years after the date of the execution of the bond; and the plaintiff contended, that the defendant had had ample time to have raised the amount, mentioned in the bond, by a sale of the property of his wards: that it was his duty by law so to have done; and that his neglect or delay in so doing ought not to prevent the plaintiff from recovering.

The defendant contended, that the true construction of the bond was, that the money was to be raised out of the rents and profits of the property of his wards: that he had no right to sell it, or any part of it, to pay the bond; and that there was no evidence, that any rents or profits had been received by him, nor even that the property had been delivered over to him, except what might be inferred from his appointment as guardian; and that consequently the plaintiff could not recover. And of this opinion was the Court, in submission to which the plaintiff was nonsuited, and appealed to the Supreme Court.

No counsel for the plaintiff.

Strange, for the defendant.

PEARSON, J. This was debt on a bond for $360. The defence was, that payment was not to be made, until the defendant, as guardian of the children of Hugh McRae, could raise the money out of the *rents and profits* of the property of his wards.

His Honor was of opinion, that such was the proper construction of the bond. In this, we think, there is error. It is true, that for the maintenance and education of a ward, the guardian has no right to expend more than the income. But for the payment of debts, for which his ward is liable, a guardian has it in his power, by proper proceedings, to sell the real, as well as the personal estate.

The true construction of the bond is, that the money was to be paid as soon as it could be raised by a sale of the property of the wards of the defendant. He was bound to procure a sale for that purpose within a reasonable time. Certainly, it could have been done within some time short of *three* years.

PER CURIAM. There must be a *venire de novo*.

SAMUEL P. MORTON & WIFE & AL vs. INGRAM & AL.

A person, named as executor, is not competent as an attesting witness to a will of personalty. Nor will his subsequent renunciation and release make him so. He must be disinterested at the time of attestation.

The cases of *Allison* v. *Allison*, 4 Hawks 141, and *Tucker* v. *Tucker*, 5 Ire. 161, cited and approved.

Appeal from the Superior Court of Law of Anson County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

This was an issue, *devisavit vel non*, made up to try whether a certain script was the last will and testament of Isham Ingram, deceased. While the issue was pending in the County Court, the caveators had an entry made upon the records of the Court, that they admitted the script to be the last will and testament of the said Isham Ingram, as to his real estate therein devised, and contested it only as a will of personalty. Upon the trial of the will in the County Court, the jury found it to be the will of the said deceased, both as to his real and personal estate, and from the judgment thereon the caveators appealed to the Superior Court. At the trial in the Superior Court, Dr. Christopher Watkins, one of the subscribing witnesses to the script, was offered as a witness to prove its due execution, but he was objected to as a witness to prove the script to be a will of personalty, because he was named executor therein. The plaintiff then exhibited a release from the said Christopher Watkins, of the following purport, to-wit: that he had no desire or intent of acting as executor, or of taking upon himself any of the trusts mentioned in the said paper writing, and which by law might be cast upon him—that therefore, and in consideration thereof, he released to Joseph Ingram, &c., all right, trust and interest, which, by the said appointment as executor aforesaid, or by law, or otherwise, he might or could have by reason of said appointment, thereby renouncing and absolutely refusing to assume or take upon himself any of the rights or trusts of an executor under said paper writing, purporting to be the said Isham Ingram's will. The Court held that the said witness was incompetent to prove the script to be a will of personalty; and the jury, under the charge of the Court, found the script to be the last will and testament of the said Isham Ingram, deceased, as to the real estate therein devised, but not his last will and testament, as to his personal estate therein mentioned. Judgment was

given accordingly, and also against the plaintiffs for the costs, and the plaintiffs appealed.

Mendenhall and Dargan, for the plaintiffs.

Winston and Miller, for the defendants.

PEARSON, J. There is no error. The only question presented is, whether the person, named as executor, is competent as one of the *attesting* witnesses to a will of personalty. It is settled, that the witness must be disinterested at the time of the attestation, and it is decided in *Allison* v. *Allison*, 4 Hawks. 141, cited and approved in *Tucker* v. *Tucker*, 6 Ire. 161, that a right to commissions is such an interest as disqualifies a witness. An executor has a right, by law, to commissions upon the receipts and disbursements of the assets. The fact, that the witness renounced, and executed a release, does not remove the disqualification, which existed at the time of the attestation.

No unnecessary costs were incurred in reference to the will, so far as it concerned the real estate. It was, therefore, right to require the propounders to pay the costs of the proceeding.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF RICHARD J. GREGORY *vs.* WILLIAM B. HOOKS & AL.

When, in an action upon a constable's bond, the breach assigned is, that the constable "had failed to return to the relator the note" which he had placed in his hands for collection, it is a sufficient defence for the officer to shew, that he had obtained a judgment on the note; for then the note became merged in the judgment and remained in the hands of the justice.

Appeal from the Superior Court of Law of Wayne County, at the Fall Term 1850, his Honor Judge ELLIS presiding.

This was an action of debt upon the official bond of the defendant, Hooks, executed in February 1845, for the faithful discharge of the duties of the said Hooks, as constable for the ensuing year. The plaintiff alleged that the relator had placed in the hands of Hooks, during that year, a certain note for collection. The declaration charged three breaches of the bond in relation to this note, the two first of which it is unnecessary to state, as no question upon them was presented to the Supreme Court. The third breach assigned was, that "the defendant Hooks had failed to return the note to the relator," his engagement having been to collect the note or return it. Upon the latter count, it appeared, that the defendant, Hooks, had been elected constable for one year from February 1845, and had entered into the bond declared on—that during that year the relator had placed in his hands for collection, as constable, the note in question, which the said Hooks promised to collect or return—that, within a

day or two after Hooks received the note, a judgment was obtained thereon and execution was sued out against the maker. A demand by the plaintiff was admitted, and the note had never been returned, nor accounted for to the relator, nor did the defendant offer to return it upon the trial. The plaintiff contended, that he was entitled to recover the full amount of his claim, as the note had never been returned.

The Court charged the jury, that, as to the third breach alleged, for a failure to return the note, the plaintiff was entitled to recover, but they should give him only nominal damages, as there was no evidence that the maker of the note was able to pay it, at any time after it had been received by Hooks.

The jury returned a verdict for the plaintiff upon the third count only of the declaration, and gave nominal damages.

From the judgment thereon the plaintiff appealed.

J. H. Bryan, for the plaintiff.

Mordecai and Washington, for the defendants.

Pearson, J. The third breach assigned is, that he "had failed to return the note to the relator." Upon this (which is the only matter excepted to) the charge is, 'for a failure to return the note, the plaintiff is entitled to recover nominal damages only." To this the plaintiff excepts. There is no ground for the exception, for, admitting that his Honor ought to have charged, that, unless the note was returned or *accounted for*, the plaintiff was entitled to recover its value, as being converted and applied to his own purposes by the officer, the exception was untenable, because the case states, that, "in a day or two after the note was put into his hands a "judgment was obtained thereon and execution sued out." This accounts for the note; it merged in the judgment, was cancelled, and remained in the hands of the justice.

Whether the plaintiff would have been entitled to any, and what damage, if a failure to return the *judgment* had been assigned as a breach, is a different question; for a judgment is a *quasi* record, and ought properly to be retained by the justice. We are not informed what is the fact in reference to this matter; at all events the Judge did not decide this question, and the exception does not raise it.

There is no error, of which the plaintiff has a right to complain.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF WILLIAM B. EDMUNDSON vs. WILLIAM HOOKS.

What the description in a deed for land means, or whether it conveys any definite idea, are questions for the Court, and ought not to be left to the jury.

Appeal from the Superior Court of Law of Wayne County, at the Fall Term 1850, his Honor Judge ELLIS presiding.

This was an action of ejectment, in which the lessor of the plaintiff claimed title to the premises in dispute, by purchase at a sheriff's sale, made under several judgments and executions, tested from Nov. 1845, to June 1846, of which regular transcripts were produced; and the plaintiff also produced a deed from Otlin Carr, sheriff of Wayne, which, it was alleged, conveyed to him the title to the

premises. The sheriff's deed recited several executions against John Hooks and other persons, that in pursuance thereof he levied upon *certain pieces or parcels of land, situate, lying and being in the County of Wayne, to wit: defendant's lots at Nahunta Depot, and land joining Ichabod Pearson and Josiah Evans, and Daniel Hanell and others*, and that he afterwards, at public auction, sold the said premises to William B. Edmundson, and the deed then, in consideration of the premises and the purchase money paid, conveyed the said pieces or parcels of land, as above described, and their appurtenances to the said William B. Edmundson in fee. The plaintiff then proved, that John Hooks, the tenant in possession, had been in possession of the premises for several years prior to the sale made by the sheriff, was in possession at the time of the sale, and has continued in possession ever since. The sheriff was introduced, and proved that he levied on the lot described in the declaration, (the description in the declaration corresponded substantially with that in the sheriff's deed,) under the executions above referred to, and sold that identical lot on the 16th of November 1846, when the lessor of the plaintiff became the purchaser, and that he intended to convey the same by his said deed.

The defendant, William Hooks, who had been admitted to defend as landlord of John Hooks, gave in evidence a deed from John Hooks, (under whom the plaintiff claimed) to Wright Woodard, one of the defendants in the above executions, dated 9th of May 1844, and also a deed from the said Woodard to him, William Hooks, dated 21st of November 1846, and contended that thereby the legal title vested in him, and therefore the plaintiff could not recover. He further proved, that, although the lots sued for adjoined A. G. Person, they did not adjoin Daniel Hanell; but that John Hooks, one of the defendants in the executions, had land which did adjoin Person and Daniel Hanell and others, and contended that this land,

and not the lots, must be held by a proper construction of the levy to have been levied on. The defendant further contended, that the description of the lots in the sheriff's deed to Edmundson was entirely too vague and uncertain to operate as a conveyance of land. The defendant further proved, that, at the execution sale, at which Edmundson bought, the sheriff declared, that he only intended to sell the interest of John Hooks, and that, therefore, no interest of Woodard could pass by the sale.

The plaintiff insisted, that whatever interest John Hooks had in the premises, at the time of the sale made by the sheriff, if nothing more than a naked possession, was transferred to him, and that he had a right to be put in possession of it, and that William Hooks, as landlord, could not set up any title acquired by him subsequently to the sale in opposition to the plaintiff's title and to defeat his claim.

His Honor overruled the defendant's objections, and instructed the jury, that, if they believed the premises in dispute were included under the levy, and the sheriff's deed to the lessor of the plaintiff, the plaintiff was entitled to recover.

The jury found a verdict in favor of the plaintiff, and from the judgment thereon the defendant appealed.

Mordecai, for the plaintiff.

J. H. Bryan, with whom was *Washington*, for the defendant, relied on the following points:

The land is described in the sheriff's deed as "the defendant's lots at Nahunta Depot." This description is too vague and indefinite—and the sheriff's intent, as to what he sells, can only be collected from the deed itself. *Sheppard* v. *Simpson*, 1 Dev. 244. *Massey* v. *Bellisle*, 2 Ire. 177.

A party conusant of his rights may sell by a general description—an officer must *define* what he sells. *Jack-*

son v. *Delaney*, 11 J. R. 273. *Jackson* v. *Roosevelt*, 13 J. R. 103.

The Judge left a question of law to the jury. He told them "if they believed the premises were included in the sheriff's deed," &c., the plaintiff was entitled to recover. Parol evidence is admissible to apply the description in a deed to its subject matter—but what the deed conveys and what is its legal operation is matter of law.

Pearson, J. The sheriff held several executions against John Hooks and others: one against John Hooks alone, and one against John Hooks and Woodard. The deed recites all of these executions: a levy upon "the defendant's lots at Nahunta Depot," a sale, and thereupon conveys "the lots levied on" to the lessor. The question is, does this deed vest the title of the lots sued for, in the lessor? We think the description too vague and uncertain, and therefore, the deed passes nothing.

The execution against John Hooks and Woodard, was not levied on the lots, and has no bearing on the case.

"The defendant's lots at Nahunta Depot" is the description; what it means, or whether it conveys any definite idea, was a question for the Court, and ought not to have been left to the jury. It has no definite meaning. If we suppose it means lots belonging to all of the defendants, there is no subject to fit it! If we suppose it means lots belonging to John Hooks, one of the defendants, still there is no subject to fit it: for, although John Hooks lived on the lots sued for, and they might have been described as "the lots on which John Hooks now lives," yet they do not answer the description supposed, for in fact they did not belong to him, as he had, some two years before, conveyed them to Woodard. The description is unmeaning, and the Court should so have instructed the jury.

This defence does not at all impugn the rule, that William Hooks, defending as landlord, could only make such

defence as was open to the tenant; because he was at liberty to say to the purchaser at the sheriff's sale, "Your deed does not cover the land."

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN SIMPSON *vs.* NATHAN KING & AL.

A testatrix bequeathed as follows, "My girl Maria, after my death, I do not leave her as a bond slave to any person, I wish her to live among my children, or otherwise if she sees proper. I leave J. S. to act as trustee for said girl." Also, "I will and bequeath twenty-five dollars to Maria." *Held*, that, under this will, J. S. took the legal title to the girl Maria.

Appeal from the Superior Court of Law of Caswell County, at the Fall Term 1850, his Honor Judge MANLY presiding.

This was an action of detinue for the slaves Maria, &c., tried upon the plea of *non detinet*.

In the last will and testament of Letitia Foster, who died and whose will was admitted to probate in 1837, appears the following clause, to-wit: "My girl Maria, after my death, I do not leave her as a bond slave to any person, I wish her to live among my children or otherwise, if she sees proper. I leave John Simpson to act as trustee for said girl." And in another clause she says, "I will and bequeath twenty-five dollars to Maria". Under this will, the plaintiff claims the slaves in question.

It appeared in evidence, that, a short time after the death of Mrs. Foster in the same year, Nathan King, the executor and now one of the defendants, consented that

the plaintiff might take the negro Maria, which he accordingly did, and she has since been under his control, up to within a short time before the institution of this suit, when the defendant, King, and the other defendant, one of the next of kin of the testatrix and interested in her estate, took possession of the slave, Maria, and the other slaves, who are the children of Maria, born since the death of the testatrix and since possession was given to the plaintiff; and the defendants, upon demand, have refused to surrender them to the plaintiff.

The point raised by the defendant's counsel was, whether by the will and the facts of the case, any such estate was vested in the plaintiff, as would enable him to maintain this suit.

The Court was of opinion, that there was a manifest intent in the clause of the will in question to vest in the plaintiff a trust estate in the *person* of the woman, and this, connected with an assent by the executor, would operate to confer upon the plaintiff the legal estate, which was all that was necessary to support the action in this Court.

The jury, under the instructions of the Court, found a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Kerr and *T. Ruffin, Jun.*, for the plaintiff.

Morehead, for the defendants.

Pearson, J. The declaration by the testatrix, that she does not leave the girl Maria, as a *bond* slave to any person; the legacy to her of $25, which she could only take as a person, as distinguished from mere property, and the appointment of Simpson to act as trustee *for* her, treating her as a person, instead of appointing him a trustee *of her*, treating her as property, furnish strong ground for the position, that it was not the intention of

the testatrix to bequeath the legal title of the girl, as property, to Simpson. As the girl was the property of the testatrix, upon her death, the legal title must belong to some one, and unless it was the intention to give it to Simpson, it remains with the executor; and thus the assumed purpose of the testatrix would be defeated, because it would be impossible for Simpson to act as trustee *for* the girl, as a person, or as trustee *of* her as property, if the legal title remained with the executor.

He was made trustee for the one purpose or the other, and neither can be accomplished without giving him the legal title. We do not feel at liberty to adopt a construction, by which the appointment of Simpson as trustee would be rendered wholly nugatory, and the purpose of the testatrix be necessarily defeated: not by reason of anything *dehors*, but by reason of an intrinsic defect in the will; and we therefore conclude, that the legal title is given to Simpson.

It is evident, that the testatrix supposed she had a right to confer on the girl the privilege of acting as a free person, provided she appointed a trustee to act for her, by which she means, some person to act as her *ostensible owner*; but in whom the confidence or trust was reposed, that although he was in law the master, yet he would not treat her as a *bond* slave, but would allow her to live among the children of the testatrix, or else where, if she saw proper, as a privileged person. The trust is clearly unlawful, and the result of this suit can be a matter of but little consequence, for the residuary legatees, if there be any, if not, the next of kin, may in Equity have the trust declared void, and call for the legal title.

PER CURIAM. Judgment affirmed.

DOE ON DEMISE OF WIGGINS' HEIRS *vs.* LASSITER RED. DICK.

In ejectment the rule is well established, that when a person is admitted by the Court to defend as landlord, which he has a right to claim, he stands in the place of his tenant, and can make no defence which the tenant could not have made.

The cases of *Balfour* v. *Davis*, 4 Dev. & Bat. 305, *Wise* v. *Wheeler*, 5 Ire. 196, and *Lee* v. *Hennegan*, 7 Ire. 471, explained and approved.

Appeal from the Superior Court of Law of Gates County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

On the trial of this ejectment, the lessors of the plaintiff deduced title to the land in dispute through a deed from one Benton to their ancestor, executed in August 1841. This suit was commenced against Benton, and the defendants were allowed by order of Court to come in and defend as landlords of Benton. They alleged that they had purchased the said land, as the property of the said Benton, at a sheriff's sale subsequent to 1841, and that the deed from the said Benton to the ancestor of the lessors of the plaintiff was made, expressly to defraud one of the defendants of a large debt, which he had against the said Benton, on which there had been a judgment and execution, and under which the said land had been sold, when they became the purchasers; all of which they offered to prove. The introduction of the testimony was opposed by the counsel of the plaintiff, on the ground that Benton was estopped, as against the lessors, and the same estoppel extended to the defendants.

The Court received the testimony and the defendants had a verdict. From the judgment thereon the plaintiff appealed.

A. Moore and W. N. H. Smith, for the plaintiff.
Heath, for the defendants.

PEARSON, J. It is stated in the record, "At Fall Term 1846," "Timothy Lassiter, Wiley Reddick, and Lassiter Reddick, came into Court *as landlords*, enter into the common rule, and are permitted to defend." A landlord has a right to be made defendant with his tenant, when he appears, or to defend in his stead, if he fails to appear, but in either case he can only make such defence, as the tenant can make. He stands with, or in the place of, the tenant, and is entitled to his rights, and is subject to his disadvantages. *Balfour* v. *Davis*, 4 Dev. & Bat. 305, *Knight* v. *Smyth*, 4 Maule & Selwyn 347.

Wise v. *Wheeler*, 5 Ire. 196, and *Lee* v. *Hannegan*, 7 Ire. 471, were cited by the defendant's counsel, as being, in some measure, opposed to the rule above laid down.—But it will be seen, upon examination, that such is not the fact. The former case expressly admits the general rule in reference to landlords, and takes a distinction, because John H. Wheeler did not profess upon the record to be the landlord; and, inasmuch as no stranger has a right to defend with, or in the place of, the person in possession, the Court inferred, that Wheeler, upon the default of the person in possession, had been allowed, by the consent of *the plaintiff*, to make himself defendant, and was at liberty to take an independent position. In the latter, the case states, that Mary Hannegan was made defendant by the consent of the plaintiff, and no objection was made to her defence. So both these cases recognise the well settled rule in regard to landlords. There is error in allowing the defendants to rely upon a ground of defence, which

was not open to Benton, the person in possession, for, except as his landlords, they had no right to make themselves defendants, and, after doing so, they were bound to act up to the relation which they professed, in order to get the privilege of making defence.

There is some discrepancy between the record, and the case made by the Judge. This states, "this suit was commenced against Benton, and the defendants were allowed, by an order of Court, to come in and defend." If a contradiction occurred, we should be bound by the record, because the province of the Judge is simply to state the case; the record is sent to speak for itself. There is, however, no contradiction; the Judge makes a general statement, which is reconcilable with the particular statement of the record.

It is probable, the attention of his Honor was not directed to the statement in the record, that the defendants were allowed to defend *as landlords*, and because he thought the case within the decision of *Wise* v. *Wheeler*, and not under the general rule.

Per Curiam. Judgment reversed and *venire de novo*.

JOHN PATTERSON vs. JOHN BRITT & AL.

The acts of a ministerial officer, as a constable or sheriff, in making returns on warrants and writs, although required by law to be returned into a Court of record, do not make a part of the record, are only *prima facie* taken to be true, and may be contradicted and shown to be false, controlled, &c.

A sheriff cannot be made responsible for the acts of a constable, who sometimes acted as his deputy but never without a special deputation, and who has committed a trespass by levying a void attachment, unless it can be shown that he was expressly authorized by the sheriff to levy such attachment.

Much less can he be responsible, when the constable returns the attachment levied by him *as constable*, although by an order of Court the return is permitted to be amended by stating the levy to have been made by the *sheriff* by the said constable as his deputy, the sheriff's office having then expired and the order of amendment having been appealed from.

The case of *Smith* v *Lowe*, 5 Ire 197, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Fall Term 1850, his Honor Judge ELLIS presiding.

This was an action of trespass *de bonis asportatis*.

The plaintiff alleged, that he was in the possession, and owned a stock of merchandise, on the 28th of June, 1847, when they were taken from him by one Exum, who professed to levy upon them in pursuance of an illegal attachment, sued out by the defendant, Britt, and that he did the act as deputy of the other defendant, Edmundson, who was at the time the sheriff of Greene County, when the goods were taken.

The defendants pleaded severally the general issue, and justification.

It was proved by the witnesses, that the plaintiff was the owner, and in possession of a stock of dry goods, groceries, and a variety of articles of merchandise in the town of Snow Hill, and County of Greene, on the 28th of July, 1847.

It was also proved, that, on that day, the defendant, Britt, sued out an attachment against the property of the plaintiff, for the sum of four hundred and fifty dollars. It was issued by a Justice of the Peace, directed to "any constable or other officer" of Greene County, and made returnable before the Justice issuing it, or any other Justice of the Peace for Greene County.

This attachment was placed in the hands of one Exum to execute. Said Exum was, at the time, a constable in Greene County, and sometimes acted as deputy sheriff for the defendant Edmundson; but only when specially deputised. It was also proved, that the entire stock of merchandise of the plaintiff was taken from his possession by the said Exum, who professed to levy upon the same, under said attachment. It did not appear that the said Exum had any valid process against the plaintiff on the 28th July 1847, but it did appear that on the following day, the 29th, he had other regular attachments authorizing him to levy on the property of the plaintiff.

The witnesses differed as to whether the property was taken under the defendant, Britt's attachment, upon the 28th or 29th of July of said year. Two witnesses stated, that it was on the 29th, and one stated that it was on the 28th; and the levy, endorsed upon the attachment itself, which was subsequently returned to the County Court, was dated as having been made on the 28th of July 1847. By a record introduced by the plaintiff, it appeared, that the said attachment was returned into the Court of Pleas and Quarter Sessions for Greene County, at its next regular term after July 1847, to-wit, in August 1847;

when the defendant, Britt, applied to the Court to order it to be docketed, and for leave to amend by making the attachment returnable to the said Court of Pleas and Quarter Sessions at its said Term, and for leave to amend the officer's return, and the direction of the attachment. The Court ordered the case to be placed upon the docket, and allowed the amendments to be made, as moved for, and they were actually made, from which order of amendment the plantiff took an appeal to the Superior Court.— The return upon that attachment, as amended, as appeared from said transcript of the record of said Court, recited that said attachment had been executed by levying upon the aforesaid property of the plaintiff on the 28th of July, 1847, and was signed "Haywood Edmundson, sheriff, by Jas. E. Exum, deputy sheriff." It appeared from the record, that the defendant, Edmundson, resigned his office of sheriff, on Tuesday of the term, when another person was elected, and the amendments to said attachment were allowed, on Wednesday of the same term of the Court, and that the first return was endorsed by Exum, as constable, upon the said attachment. Upon the question of damages the plaintiff called John S. Hardie, who testified that the stock of goods, which the plaintiff had on hand when they were taken by Exum, was worth between four and five thousand dollars. Joseph Dixon, a witness, thought the goods were worth from three to four thousand dollars, when Exum took them. The plaintiff proposed to show, for the purpose of recovering vindictive damages, that he had been forced by a body of armed men to leave his store-house, and goods at Snow Hill, on the 27th of July 1847, and that he was subsequently kept away by the same means, and that these facts, and the cause of his absence, were known to these defendants and said Exum, the deputy of the defendant, Edmundson, when the said attachment was sued out on the next day, and

the goods taken by Exum. The defendants objected to the evidence, but it was admitted by the Court.

The defendants introduced evidence of regular and valid process by attachment, placed in the hands of Exum on the 29th of July 1847, against the plaintiff's property.

The defendants also called a witness to prove, that, when Exum took the property of the plaintiff under the attachment of the defendant, Britt, he was acting as constable, and not as the deputy of the defendant, Edmundson. Upon objection on the part of the plaintiff, the Court expressed the opinion, that it was immaterial how the fact was, as the return of the defendant, Edmundson, to the County Court, (which is heretofore set forth) after the amendment was allowed, amounted to an acquiescence in the trespass, which had been theretofore committed by the said Exum, when professing to act under the said attachment, if the act was a trespass: That it appeared from the record of the said Court, that the return was made by the defendant, Edmundson, through Exum, his deputy, and the return thus appearing of record was full and conclusive proof, that it was the act of Edmundson, and he could not now be heard to deny it, at least so far as the fact of its being his return. And, by this act of record, he assented to, and adopted, all the previous acts of the said Exum done under the said attachment. The evidence was not heard. It was proved by the defendants, that a part of the said goods came to the hands of one Vass, with the assent of the plaintiff, and another portion to the hands of one Williams, under orders of the County Court of Greene, by consent of parties, made in the case of the defendant, Britt, against this plaintiff, relative to the said attachment, returned to the said Court; and that another part came in the same way to the hands of one Moses Patterson. It was also proved by the defendants, that a part of the said goods had been sold by the said Exum and the proceeds applied to the payment of regular

attachments, placed in his hands on the 29th of July 1847. The defendants also introduced evidence of the value of the several amounts of goods, that came to the hands of the respective parties above named, and the amount applied by Exum to valid attachments.

The Court charged the Jury, that the plaintiff's right to recover depended entirely upon the question, whether the goods were taken on the 28th or 29th of July 1847. If they were taken on the 29th, they should return a verdict for the defendants, because, on that day Exum had regular and valid process in his hands, authorizing him to take the property of the plaintiff, and it mattered not, though he professed to take under other, and void process. But, if they should be of opinion, that the property was taken upon the 28th of July, then the plaintiff would be entitled to recover, because the attachment, under which Exum professed to act, was void, and did not authorize him to take the property of the plaintiff, and it did not appear, on that day he had any regular and valid process; and because these defendants were both responsible for the acts of Exum, it appearing of record that they both, subseqently, acquiesced in these acts, the defendant Edmundson by the return of the attachment, and the other defendant, Britt, by accepting the return and prosecuting the said suit against the plantiff; that, if they believed the plaintiff entitled to recover, the proper measure of damages would be the value of the goods at the time they were taken, deducting the value of goods, that came to the hands of Vass, Williams, and Moses Patterson by the consent of the plantiff; that they might also allow such sum as they should think reasonable for the injury sustained by the plaintiff, by being deprived of the use of his property since it was taken; that, if they thought the circumstances of the case would justify them, they would be at liberty to give vindictive damages by way of punishment to the defendants; that they should make no

deduction for any of the goods appropriated by Exum to any purpose without the consent of the plaintiff, even though the same might have been appropriated to valid claims in his hands against the plaintiff.

The jury returned a verdict for the plaintiff. The defendants moved for a new trial for error in the instructions to the jury, and for the exclusion of proper evidence, and the admission of illegal testimony. Rule discharged, and a judgment: from which the defendants appealed to the Supreme Court.

Rodman, for the plaintiff.

J. H. Bryan, J. W. Bryan and Washington, for the defendants, made the following points.

The return of Exum is not conclusive of the facts therein recited; they are acts "in pais" and not the acts of the Court. *Smith* v. *Low*, 5 Ire. 107. 28 E. C. L. R. 423.—23 *Wendell's Rep.* 289.

The return was the act of Exum and not of Edmundson, the sheriff; it was a single, isolated act, and no evidence of itself against the sheriff. He was not the general deputy of the sheriff.

The damages should have been reduced by the evidence, that a portion of the goods were applied to *bona fide* attachments against the plaintiff. 2nd *Greenl. Ev.* 278.—*Coolege* v. *Choate*, 9 Mas. L. R.

Even if the sheriff had adopted the return of Exum, he would not have been liable for vindictive damages. *Hoyt* v. *Gelston*, 13 J. R. 141.

At common law, no one is a trespasser by relation, unless the trespass was done to his use or for his benefit, though he agree to the trespass after it be done. *Wilson* v. *Baker*, 24 E. C. L. R. 124. *Co. Lit* 180, C. N. 4.

Pearson, J. The Court charged,—"that the defendants were both responsible for the acts of Exum, it appear-

ing, of record, that they both subsequently acquiesced in these acts—Edmundson by the return of the attachment, and Britt, by accepting the return and prosecuting the suit.

There is error, in holding Edmundson responsible for the acts of Exum, and giving to the return this conclusive legal effect. How far the superior is bound by the acts of the deputy is not the question; but it is, did Exum levy upon the goods of the plaintiff *as the deputy* of Edmundson? The original return, made by Exum, was a levy by him as constable. The County Court permitted him to amend, so as to make it a return of a levy by Edmundson, as sheriff, by Exum his deputy. To this amended return is given the conclusive effect of a record, whereby it is established, that Exum made the levy as deputy, and consequently, that Edmundson is responsible in the same manner as if he had done the act himself.

In what light the question would be viewed, if Exum had been a regular and known deputy, without any other capacity, is not before us. The case states that he was a constable, who sometimes acted as deputy, but only when *specially deputised;* no express deputation is pretended, and, if he can be made a deputy at all, it must be, as an inference, from the fact of his assuming that character, in making the amended return. This was done after Edmundson went out of office, and he is not shown to have had notice of it. How the assumption in a single instance, without the knowledge of the principal, can conclusively establish the character assumed, so as to make the superior liable in trespass, we are not able to conceive. His Honor, it seems, gave to the return this conclusive effect, by treating it as a record, which imparts absolute verity. He was mistaken in his premises. A record states the acts of the Court itself. The acts of a ministerial officer, as a constable or sheriff, in making returns on warrants and writs, although required by law to be returned into

a Court of record, do not make a part of *the record*, are only *prima facie* taken to be true, and may be contradicted and shown to be false, antedated, &c. *Smith* v. *Low*, 5 Ire. 197. If such a return is not conclusive as to the acts, much less is it conclusive as to the character, of the person, who makes it in the name of a supposed superior.

The amended return, if evidence at all, was *at most* only *prima facie* evidence, that Exum was the deputy, and there are many circumstances tending to rebut it—he was a constable—never acted as deputy without a special deputation; he made the levy and the original return as constable, and the order allowing the return to be amended, was vacated by an appeal.

His Honor ought to have submitted the question to the jury, and it was error, to hold the fact conclusively established by the record. As the case will be tried again, it is proper to notice an error, on the question of damages. His Honor held, that the damages could not be abated in respect of the regular attachments, levied on the 29th of July, and under which a part of the property was subsequently sold, and the proceeds applied in discharge of the debts sued for. In this there is error. The levy created a *lien* on the property, and authorised the officer to retain an amount sufficient to satisfy the judgments, *without the consent* of the plaintiff. His Honor seems to have confounded this case where there was a lien, with that of an officer who sells under one execution, and claims a right to apply the excess of sales to a note or other debt, upon which there was no judgment, execution and levy—here there was a levy which created a lien. We give no opinion upon the subject of vindictive damages, because the case does not raise the question. The damages were $2,800, they are not stated to be vindictive, and for any thing that is stated, it may be, that this sum was the balance of the value of the goods, after deducting the

sums allowed for the amounts, which, with the consent of the plaintiff, went into the hands of Vass, Williams, and Henry Patterson. These amounts are not given.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN McPHERSON & AL. *vs.* ALEXANDER McPHERSON & AL.

In the action of account there are two judgments; first, that the plaintiff and defendant account together; secondly, that the plaintiff or the defendant recover the balance found to be due from the one to the other.

In order to obtain the first judgment, it is not necessary for the plaintiff to shew that the defendant is indebted to him as bailiff, &c. He need only shew that he is bound to account with him as bailiff, or as a tenant in common, who has been in the pernancy of the profits, and the right to this judgment can only be barred by proof on the part of the defendant that he has already accounted, or by a denial, uncontradicted on the part of the plaintiff, of the existence of any such relation between the parties, as gives the plaintiff a right to call for an account.

Where there are several tenants in common, some of whom have been in the receipt of profits and some not, each of the latter must bring his own action of account for what he claims—they cannot bring a joint action in the names of two or more, to recover their several shares.

So where several tenants in common receive the profits, unless it can be shewn that they received them jointly as partners, an action of account cannot be brought against them jointly, but each must be sued separately.

If either of these cases appear upon the trial, the Court will order a non-suit

Every tenant in common, who has been in the enjoyment of the property, is liable to account; and it is not material what was the mode of enjoyment, whether he used it merely for shelter, or as a means of supporting himself and family, or made money by selling the products, or received money as rent.

The case of *Powell* v *Mathis*, 4 Ire. 63, cited and approved.

Appeal from the Superior Court of Law of Cumberland County, at the Spring Term 1850, his Honor Judge SETTLE presiding.

This is an action of account, brought by the plaintiffs, alleging that the defendants were tenants in common with them of a certain tract of land, which had descended to them from a common ancestor, and received more than their proper share of the rents, and profits, for which they had refused to account.

The proof was, that Alexander McPherson died more than twenty years ago, leaving his widow and eight children—all of whom had gone off and left their parents, except the three daughters, who, with their mother, remained on the land until 1836, when the defendant, Alexander, purchased a place of his own, and moved off, leaving his sisters still there.

It appeared, that in the year 1841, Mrs. McPherson died: That in 18—, Mrs. Rhodes, formerly Margaret McPherson, died, leaving a husband, and several chidren surviving her: that in the year 1838, Hugh, one of the brothers died intestate, and without issue, or ever having been married: that in the year 1839 Neill, one of the brothers, released all that interest in the land which he had acquired by descent from his father, to his two sisters the defendants, and that, by a deed without date, and it did not appear when made, he released his interest as heir at law of his deceased Brother Hughes, to one of the plantiffs; that in the year 1831, Martin McPherson released his interest as heir at law of his father, to his sisters the defendants, but it did not appear that he had ever released his right as heir at law of his deceased brother Hugh.—It also appeared that Rhodes, the husband of Margret, died in 1848, pending this action, and that his administrator was made a party plaintiff in his stead.

The defendants denied that they were the tenants in common of the plaintiffs or that they were their Bailiffs; and also pleaded and relied on the statute of limitations. They further objected to the plaintiffs' recovery, upon the ground, that although one tenant in common may maintain

an action of account, for his separate share, against any one or more tenants in common, who jointly receive more than his or their share of the rents and profits of the common property; yet he cannot bring a joint action against several cotenants, who, without any concert, each takes more than his share of the common profits. Again, the several tenants in common cannot join in a common action against several other tenants in common, without some contract, whereon to have such an action. And again, that if several tenants in common may join in an action against several others, who occupy the property, all the tenants in common, out of possesion, must join in such action againt those in possession, and that, in this case, Martin McPherson, who has clearly not parted with his interest as heir of his brother Hugh, and Neill, who had not been proven to have parted with his interest before the bringing of this action, were not parties. It was further objected, that the mere perception of the products of the land, not turned into money by sales, by one tenant in common, would not enable his cotenant to maintain the action against him. It was further objected, that Rhodes and his administrator were not the proper parties in this action. It was further objected, that no demand had been made before bringing the action.

His Honor charged, that if the defendants, or any of them, had received more than their share of the profits of the land either in money or fruits of the earth or otherwise, within three years before the bringing of this action, the plaintiffs were entitled to their verdict: That merely living and breathing on the land would not subject the defendants to account, if they did not exclude the plaintiffs from a like enjoyment: Nor would the use of no more than their proportionate share of the land in any way subject them. But if they used more than their own share of the land, and derived any thing from such use, they would be liable.

The plaintiffs' counsel then asked the Court to charge the jury, that, if one of the defendants was seen bringing wood from the land to market apparently to sell, and the jury believed it was so sold, the defendants would be liable. His Honor declined so charging, but said, unless it appeared that the defendants or one of them had received more than his own share, the action would not lie.

A verdict being rendered generally for the defendants and judgment rendered thereon, the plaintiffs appealed.

Banks, with whom were *Mullins*, *W. Winslow and Kelly*, for the plaintiffs, submitted the following argument:

Three several and distinct technical objections are raised by the defendants' pleadings; either of which, it is contended, will prevent the plaintiffs obtaining a new trial, notwithstanding there may be error in the Judge's charge.

It is said, 1st. There is a *non* joinder of plaintiffs. 2nd. There is a *mis* joinder of plaintiffs. 3rd. There is a *mis*-joinder of *defendants*.

On the *first* point. It is contended by the defendants, that Martin McPherson should be a party plaintiff, and that the non-joinder is cause of non-suit.

On the part of the plaintiffs, it is admitted that the non-joinder of a party, who *ought* to sue, "is fatal on demurrer, or on motion in arrest of judgment; or on error; or by plea in abatement; or as a ground of non suit on the trial; *as a variance* upon *non est factum*, if the action be a *specialty*; or, if it be upon any other contract, upon the plea of "general issue."" 1 *Chit Pl.* 14.

In this cause there has been *no* "*demurrer*," *no* "plea in *abatement*. The action is *not* upon a *specialty*. Hence the defendants cannot claim the benefit of a *variance*.—*They* have *obtained judgment*, and neither wish to *move*

for its *arrest*, or to have it vacated for "error," and could not, if they would—the plaintiffs being the appellants.

This narrows the question down to one single point—*Can* the plaintiffs in this action be *non suited*, on the plea of "*general issue?*" It is submitted they cannot, for the following reasons:

In an action of *account*, there is *no* "*general issue.*" 1st *Chitty's Pl.* 524. In an action of *account*, there is not, and never was any "*general issue.*" *Pulling on Mercantile Accounts*, 120, 121.

It is submitted further, that as Martin McPherson was *unwilling* to *join* in the action as plaintiff, there was no process of compulsion: and he could not be sued as a defendant, because the evidence shows he was not in possession.

The following cases are submitted, as authority, to justify the positions assumed.

"A. alone, declared against B. as bailiff of 3. It was held good; for perhaps A., only, entrusted his share to B. 1st *Comyns Digest Accompt.* 122, E. 12. 1st. *Viners Ab. sec.* 20, 145."

Again—"In an action of account by A. against the defendant as bailiff of *one*; it appeared by the plaintiff's own showing, he was bailiff of *two*. It was held good, for there was no *repugnancy* in the *counts*, and it might be *mischievous*, if one tenant in common could not have his action, without the other joining." *Cro Jac.* 410. 1 *Vin. Ab. sec.* 7, 176.

There is "no *repugnancy* in the *count*," for if he was "tenant in common" and bound to account with *three*, so is he bound to account with *two*.

To the *second* objection, viz: That there is a *misjoinder* of plaintiffs—the suit being in the name of *two*—when only *one* should have sued.

It is insisted by the plaintiffs, that "tenants in common," may in this action sue jointly, or severally, at their

option; and it is contended, that, in cases of misjoinder, *if* the objection *appear* on the face of the pleadings, advantage of it can only be taken "by plea in abatement," "demurrer," "motion in arrest of judgment," or by "writ of error." 1st *Chitty Pl.* 484. 1st. *Saunders Pl. Ev.* 14. In this case the *objection* of misjoinder *appears* upon the pleadings, and, as *neither* of the above remedies can be applied to this case, it follows, that the second objection fails, as the statute of *Jeofails after verdict cures defects.* It is admitted, that *in cases of misjoinder*, "if the objection do *not* appear upon the plaintiffs' pleadings, it will be ground of non-suit at the trial." 1st *Saunders Plead. Ev.* 14.

In North Carolina, tenants in common, (contrary to the rule in England) may recover in an action of ejectment on a *joint* demise. *Nixon* v. *Potts* 1 Hawks 402. Two or more tenants in common may recover in an action of ejectment, though one or more may be omitted. *Bronson* v. *Paynter*, 4 Dev. & Bat. 393. From which a rule may be deduced; "that tenants in common may sue jointly or severally at their option."

But there is a *third* objection. The misjoinder of defendants. The declaration being against *three jointly*, and the proof is they are tenants in common, seized, *as is said*, according to their interest in severalty.

It is submitted by the plaintiffs in reply to this objection: That the *three* tenants in possession are seized *per my et per tout*; not simply for their own benefit, according to their own interest, but they are *jointly seized* for the benefit of those who are out of possession, as well as for themselves. And as the possession of the *three* is the possession of the whole, they should, *as a whole*, account with those for whom they hold.

That co bailiffs may be called to account, see 1st *Petersdorf's Ab.* 100. 3rd *Wilson* 73 to 118.

But it is said the following rule is inflexible—"If too many persons be joined as defendants, in an action on a contract or specialty, if the objection do *not* appear on the plaintiffs' pleadings, the plaintiffs may be non-suited at the trial, or, if the objection *appear on the pleadings*, the defendants may demur, move in arrest of judgment or bring error." 1st *Chitty* 50. 1st *Saunders Plead. and Ev.* 14.

It is submitted, that if an objection exists at all, it *appears on the pleadings*, and yet the defendants have neither *demurred*, moved in *arrest* of judgment nor craved a writ of *error*. In failing to do so, they have waived the advantages prescribed in the rule. It is clear, they cannot claim the benefit of a *variance*, for the action is not on a *specialty*. On this point as on the first, they must rely on the plea of "general issue," and we have before endeavored to show that there is no such plea, the pleas being all special.

If, however, the Court shall be of opinion, that tenants in common should *account severally*—and is of the further opinion, that in an action of account there *is* a *plea* of "*general issue*"—then and in that event, it is admitted the plaintiffs should be non-suited, unless the act of 1789, Rev. Stat chap. 31, sec. 89, includes this case.

The construction of this statute, *hitherto*, has been, that where *several* were sued *jointly*, the judgment might be several. *Brown* v. *Clary*, 1 Hay. 107. *Davis* v. *Wilkinson*. 1 Hay. 333; and in *Sharp* v. *Jones and Winborne*, 3rd Murphy 306, the Court uses the following language:

'It has been decided in this Court, that under the broad expressions of the act of 1789, if an assumpsit be brought against two, the jury may find *against one*, and in *favor* of the *other*, thus *severing* by their *verdict* a *joint contract*, upon which the suit was brought."

It is therefore insisted that the *Equity* of this Statute may well be extended to "tenants in common," especially

in the action of account, which possesses equitable features—an action in which there are two judgments, the last of which is *predicated* upon the question, *submitted* to the *auditors*, "*Who is in arrears?*" and, in answering this question, they are at liberty to find a *surplusage against* the plaintiffs, or a balance in their *favor*, as the case may be. 1st *Selw. N. P.*, note, page 9, 1st *Arch'd N. P.* 212, 1st *Vin. Ab.* 167.

A bill in Equity is a "mere substitute for the action of account." *Wagstaff* v. *Smith*, 4 Ire. Eq. 1.

From this it follows, Equity and Law have concurrent jurisdiction, and the same rule for entering up judgment should prevail. 2 *Bur.* 1077. *Pulling on Mercantile Accounts*, 124.

The plaintiffs think the correctness of these several propositions will be illustrated by a brief analysis of the form of the action, and an abstract of the reasons assigned for a new trial.

At common law the action of *account* lay *only* against a "guardian in socage," bailiff, or receiver, and in favor of trade between merchants. *Bul. N. P.* 127. 1 *Arch'd N. P.* 196. 1st *Selw. N. P.* page 1. 1st *Bac. Ab. Accompt.* (A)

But by Statute 3 and 4th Anne, ch. 16, re enacted Rev. Stat. chap. 21, sec. 104, the action is extended to tenants in common, and one may sue the other "*as* bailiff," for receiving more than comes to his just share and proportion."

In this action there are two judgments—the first is a mere interlocutory rule—"*quod computet.*" The cause is then referred to auditors, on the question, "*Who is in arrears?*" *Saunders* v. *Godfrey*, 3 Wilson 88. 1st *Selw. N. P.* (note) page 9.

The parties come to an *issue* on the *account*, before the auditors. The Court cannot intermeddle in the account, until the auditors report. They may find a surplusage

in favor of the defendants, as well as a balance against them, but if the defendants be found in arrears *before the auditors* (and no exceptions are filed and sustained,) the plaintiffs shall have final judgment, "*quod recuperent.*" 1st. *Vin. Ab. sec.* 13, 172, sec. 24, 174, 167 and 163. 1st. *Arch'd N. P.* 212.

The reason why it is necessary for the plaintiffs to aver in their declaration, that they are "tenants in common," and the "defendants have received more than their share of the profits," is, that the *auditors*, who are *judges of record*, and take notice of the *pleadings*, may learn *therefrom*, that the action is brought under the statute, and not at common law, and that the defendants are only liable for the *actual profits*, and not those they might have made, and for the further reason of notifying them, that, under the statute, the plaintiffs are entitled to the defendants' oath, which they are not entitled to at common law; and lastly, that they may allow to the defendants all reasonable costs and charges incurred in the management of the estate. *Wheeler* v. *Horne*, Wills. Rep. 210. 3 *Chitty's Pl.* 1207–8, (Declaration.) 1 *Com. Digest* 127, E. 12.) 1st *Viners Ab.* (T.) sec. 3.

The auditors are empowered to "administer an oath," and examine the parties touching the *matter* in question, and we know of no plea that can be *pleaded before a jury* in this action, which *puts* in *issue*, whether the defendants have received *more* than their share of the profits or not; hence there is *no* "general issue." 1 *Bac. Ab. Note, Account*, (D) *Rev. Stat.* ch. 81, sec. 104. 1 *Chitty Pl.* 524. 3 *Chitty Pl.* 1208.

As the *jury* can award no amount, nor assess any damages, why should evidence to that effect be required? The action is for the *account*, not the *amount* due. Before the amount can be had, a privity of relation must be shown to exist, and it would be gross injustice to *compel* a plaintiff to make out his case before a jury—when by the form

of action selected, he in effect admits his inability to do so, without the *oaths* of the *defendants before the auditors*.

As between tenants in common, Littleton says, "*No man* can certainly tell which *part* is his own." Blackstone says, they "*occupy promiscuously*," "because *none* knoweth his own severalty," and it may be added, if each one could tell his own part, "*account*" would not lie because the "action does not lie for a sum certain." 1 *Bac. Ab.* C. and D.

The receipt of the whole profits, by one tenant in common, imposes an immediate liability to account, and the statute of limitations does not begin to run, so long as there is a common possession. *Wagstaff* v. *Smith*, 4 Ire. Eq. 1. *Northcote* v. *Casper*, 6 Ire. Eq. 303.

It is therefore contended, that, in the trial of this cause, the *only material question in issue*, before the *jury*, was, "are the parties tenants in common?" and it is alleged as error, that the Judge in his charge *passed over this "preliminary" point "to get at another," subsidiary* and *secondary thereto*. *McNeill* v. *Massey*, 3 Hawks 100.

Whether the *points reserved* be for or against the plaintiffs, it is submitted they are entitled to a new trial upon the points, on which they appealed, "as the attention of *this* Court is more properly given to such *errors* as are *alleged* by the *party who appeals*." *Norwood* v. *Marrow*, 4 Dev. & Bat. 447.

Strange, for the defendants.

Pearson, J. The judge, in the Court below, was of opinion, that in the action of account against the defendants, who were tenants in common with the plaintiffs, and were sued as bailiffs under the statute, for using more than their just share, in proportion, of the profits, it was necessary for the plaintiffs to prove to the satisfaction of the jury, not only that the defendants were tenants in com-

mon with the plaintiffs, and had been in the pernancy of the profits, but that they had received more than their just share or proportion. To this the plaintiffs excepted. We think there is error.

The action of account is peculiar, for in it there are two judgments; in the first place, there is judgment that the plaintiff and defendant account together, and in the second place, that the plaintiff or defendant recover the balance found to be due.

The first judgment, like an order of reference to the clerk to take an account in Equity, merely decides, that the plaintiff is entitled to an account; it can only be barred by proof that the defendant had already accounted, or by a denial, uncontradicted by proof on the part of the plaintiff, of the existence of any such relation between the parties, as gives the plaintiff a right to call for an account.

To require, as a preliminary question before the first judgment is given, that the plaintiff should prove *to the jury*, that the defendants have received more than a just share of the profits, is totally inconsistent with the nature of the action, for three reasons: 1st. It will require the plaintiff to prove to the jury the very thing that is to be decided by the auditor, and leaves nothing for him to do. 2nd. It will require the jury to investigate and decide matters of account, which the mode of proceeding in this action presupposes a jury is incapable of doing: 3rd. It will deprive the parties of the right given by the statute, of an examination on oath touching the matters in question.

Every tenant in common, who has been in the enjoyment of the property, is liable to account, but no recovery can be had against him, unless, upon taking the account, it is shown that he has received more than his just share. The mode of enjoyment is not material. It makes no difference, whether he uses it merely for shelter and as a

means of supporting himself and family, or makes money by selling the products, or receives money as rent; in either case he is bound to come to an account with his fellows, and can only avoid it, by averring, and proving, that he has already accounted.

The defendants' counsel earnestly contended, that it was a hardship, to be subjected to a judgment to account, without proof *in the first instance*, that more than a just share had been received, and that no tenant is safe in taking possession, if, by doing so, he subjects himself to the trouble and expense of an account. We are unable to perceive the force of the argument. If a bill is filed against an executor, or an agent, or a tenant in common, who has been in the perception of the profits, it would be strange, if the plaintiff was required, in the first instance, to prove that the defendant is in arrear. That is the very question to be settled by taking the account, and, if the plaintiff fails to establish it before the master, he pays the costs of the suit.

We think, therefore, there is error in the part of the charge excepted to by the plaintiffs, but it is apparent from the case, that they have not been prejudiced by the error. The part of the charge excepted to is a restriction or qualification of a general proposition, that the plaintiffs were entitled to recover. There is manifest error in this general proposition, in favor of the plaintiffs, and of course an error in the restriction or qualification of an erroneous proposition could work no prejudice. The charge ought to have been, that the plaintiffs were *not* entitled to recover: this would have cut off the question, raised by the exception.

The action is fatally defective, by means of a misjoinder, both of plaintiffs and defendants. The plaintiffs declare, not upon an express understanding with them jointly, but upon the implied understanding raised by the statute. Now the interest of tenants in common is several,

and of course this implied understanding with them must also be several—so their right of action is not joint, and there are too many plaintiffs, which is a fatal variance. In regard to the defendants, there is no proof that they received the profits jointly as partners. Each received portions of the profits severally, and therefore they cannot be sued jointly, for in that case each would be bound for the whole judgment, and, if the defendant, who had received the gratest share, happened to be insolvent, the burthen would fall on the others. The principle is the same, as that applicable to co sureties. If one of them pays the debt, he cannot, at law, sue the other two jointly, for each is only liable for his aliquot part, and to allow a joint suit, would be to subject one to the whole recovery, altho' his fellow may be insolvent. *Powel* v. *Mathis*, 4 Ire. 83. It was ingeniously argued for the plaintiffs, that there was no plea under which advantage could be taken of the defect of parties, and he cited a passage, 1 *Chitty* 14, where it is said, "a variance, in respect to parties, can only be a ground of non suit, under the plea of *non est factum*, in debt on specialty and covenan'; and the general issue in all other actions." It is clear, Chitty has no reference to the action of account, which he considers obsolete, and therefore does not treat of it—and in which, like covenant, there is properly speaking no general issue. As in the latter the variance may be taken advantage of, under *non est factum*, so in the former, it may be done, under the plea, that the defendants are not the bailiffs of the plaintiffs, in the manner alleged in the declaration. Both of these pleas deny the relation between the parties as alleged, and if, upon the trial, there is a variance between the *allegata* and the *probata*, it is ground of non suit; if the plaintiffs will not submit to a non-suit, the Court must instruct the jury to find for the defendants.

Per Curiam. Judgment affirmed.

THOMAS C. BRICKHOUSE, ADM'R *vs.* JAMES BRICKHOUSE.

Trover will lie for promissory notes, by the administrator of the payee, against a donee by oral gift, though the gift be accompanied by delivery.

A recovery in trover for a note or bill and payment of the damages divest the property out of the plaintiff, and, indeed, vest it in the defendant, as between him and the plaintiff.

In actions by administrators, the letters of administration, granted, as they are, by a domestic tribunal of exclusive jurisdiction, and remaining unrevoked, are *prima facie* evidence of the death of the alleged intestate and of the right of representing him.

The case of *Fairly* v. *McLean*, 11 Ire. 158, cited and approved.

Appeal from the Superior Court of Law of Tyrrell County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

The action is trover for three promissory notes, made by third persons, and payable to Joseph Brown, the intestate of the plaintiff, and amounting, together, to the sum of $175. On the trial upon the general issue, the defendant set up title to the notes under a gift from Brown; and he gave evidence, that, about the 1st of Nov. 1848 he, Brown, being about to sail on a voyage to the West Indies, delivered the notes to the defendant, (who was his uncle) saying to him, "If I never return, those notes are to be yours." Brown proceeded on the voyage at the time mentioned, and, at the time of trial, in September 1850, he had not returned, nor had he, or the vessel, in which he sailed, ever been heard of, and it was the general belief, that they were lost on the voyage.

The counsel for the defendant thereupon insisted, that the evidence, if believed, established a gift of the notes

to the defendant by the intestate, to take effect in the event the intestate should not return; and that for that reason the plaintiff could not recover. And he further insisted, that the evidence, if believed, established a bailment of the notes to the defendant, to be kept by him for the payee Brown, until he should return home, and that the same had not been determined, and that, for that reason, the plaintiff could not recover. But the Court refused to give these instructions; and, after a verdict, and judgment for the plaintiff, the defendant appealed.

P. H. Winston, Jr., for the plaintiff.

Smith, for the defendant.

RUFFIN, C. J. The recent case of *Fairly* v. *McLenn*, 11 Ire. 158, is an authority in point, that the right to property in the notes could be transferred only by endorsement and delivery, and that trover will lie for them by the administrator of the payee against a donee by oral gift, though accompanied by delivery. The doctrine is well settled. Bayley on bills 18, Story's Prom. notes, S. 120. No point was made at the trial about a demand by the administrator, so as to render the detention of the notes wrongful, and it must therefore be assumed, that the defendant refused to deliver them up and claimed to keep them as his legal property under the gift, conditional or absolute, which he set up, which is a conversion, and renders the defendant liable in this action, provided the notes belong to the plaintiff, as administrator. It was said, indeed, at the bar, that, if the notes cannot pass to the defendant but by endorsement, it is thereby established, that trover will not lie for them, as it is incident to that action, that a recovery therein of the value and satisfaction thereof vest the property, in the thing converted, in the defendant. That may be generally true, but it is by no means universally so; since trover often lies for a conversion by the

destruction of a thing. It is, moreover, will settled, that trover will lie for a bond or note, although the former be not the subject of transfer at all; and further, that a recovery in trover for a note or bill and payment of the damages divest the property out of the plaintiff, and, indeed, vest it in the defendant as between him and the plaintiff. *Holmes* v. *Wilson*, 10 Ad. and E. 511.

It is said, however, that the action does not lie, because, according to the terms of the bailment, it has not been determined by the return of the bailor. But his death determines the bailment, unquestionably, so as to make the property, which was in him, vest in his administrator. What the defendant held for the intestate at the time of his death, he held, after that event, for the plaintiff as administrator. But it was argued, that it did not sufficiently appear, that the bailor was dead. The circumstances constituted evidence on which the jury might have found that person's death, were it necessary that the plaintiff should have directly established it. But, in actions by administrators, the letters of administration, granted, as they are, by a domestic tribunal of exclusive jurisdiction, and remaining unrevoked, are *prima facie* evidence of the death of the alleged intestate and the right of representing him. *Moons* v. *De Bernales*, 1 Russ. 301.

Per Curiam. Judgment affirmed.

COOK AND TAYLOR vs. JOHN A. ARTHUR.

The assignment of a covenant for the delivery of staves does not, at law transfer the interest in the covenant.

Where in a suit by A. and B., copartners, against C., he pleaded, that in his garnishment on an attachment against A., one of the present plaintiffs, he had admitted that he owed A. the sum for which he is now sued, and he had paid the judgment rendered against him on the garnishment, *Held*, that this plea did not avail him, for he had confessed a debt due to A. alone, being different from that to A. and B. now sued on.

The effects of a firm are not subject to attachment for the separate debt of one of the partners.

The case of *Jarvis* v. *Hyer*, 4 Dev. 367, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Spring Term 1850, his Honor Judge BAILEY presiding.

The action was brought in May 1848, and is covenant on an agreement under seal, dated June 7th, 1845, whereby the defendant obliged himself to deliver in Beaufort County, 50,000 red oak hogshead staves, on or before the 1st of December 1845, to the plaintiffs, Cooke & Taylor, who were partners, and merchants in New York. The defendant pleaded covenants performed, and a foreign attachment in the Superior Court of Beaufort, commenced on the 14th of April 1846, by Vannostrick & Cogdell, against the estate of John Moore Taylor, one of the present plaintiffs, on the bill of exchange for $1100, in which the defendant was summoned as a garnishee, and upon his garnishment, in April 1846, confessed (amongst other things) that in June 1845, he gave to said Taylor his ob-

ligation to deliver to him 50,000 red oak hogshead staves, and stated that he had delivered 26,713 of them, and that the remaining 23,227 had not been delivered, but remained due to the said Taylor; and that, before the present suit was brought, judgment was rendered in the attachment against Taylor, and the value of the 23,227 staves was condemned in the hands of the defendant, and by him paid in part satisfaction of the recovery against Taylor.

On the trial, the defendant gave evidence, that, in a few days after the execution of the covenant, Taylor, in the name of Cook and Taylor, made an endorsement thereon in writing in these words, "Deliver the within to Messrs. Freeman & Houston;" but the witness stated further, that Freeman and Houston had no interest in the transaction, and that the order was given to them to enable them to receive the staves for Cook & Taylor, and that, under it, they did receive nearly 27000 between December 1845, and May 1846, for them. The defendant also gave in evidence the record of the attachment pleaded by him; and the garnishment and judgments therein appeared to be as pleaded. And thereupon the defendant moved the Court to instruct the jury, that the plaintiff could not recover; first, because they had extinguished their right by the transfer to Freeman and Houston; and, secondly, because the proceedings in the attachment were a bar to this action. The Court refused to give either instruction, and told the jury the plaintiffs were entitled to damages to the value of the staves not delivered.—The plaintiff had a verdict and judgment, and the defendant appealed.

No counsel for the plaintiffs.

Donnell and *Rodman*, for the defendant.

Ruffin, C. J. The judgment must be affirmed. The covenant was not negotiable, and the assignment could

have no effect on the legal right to sue on it, if it had been so intended. But there was no such intention.—The purpose was merely to make Freeman and Houston the agents of Cook and Taylor, so that they might accept the staves on behalf of the owners. Nor does the attachment help the defendant. The garnishment stated an indebtedness to Taylor, the sole defendant in the attachment, on an obligation to deliver staves to Taylor—being a different instrument from that to Cook & Taylor, now sued on. The difference is not formal merely, but essential to the rights of the parties, as the liability of the garnishee depended on it; since the effects of a firm are not subject to attachment for the separate debt of one of the parties. *Jarvis* v. *Hyer*, 4 Dev. 367.

PER CURIAM. Judgment affirmed.

JAMES B. MARSH vs. WILLIAM N. BROOKS.†

Although a bill or promissory note may be made payable to A. B. or bearer, yet a bond cannot. That being a deed, it must be made to some certain obligee, to whom it may be delivered.

After the bond has become a perfect instrument, the obligee can, by indorsement, order the payment to be made to the bearer, for, in respect to their transfer, notes and bonds are put on the same footing. But their nature, in their inception and before indorsement, is not touched by the statute and remains as at common law.

The case of *Fairly* v. *McLean*, 11 Ire. 158, cited, explained and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Fall Term 1850, his Honor Judge Bias presiding.

The declaration is in debt on a single bond for $325 05, payable to Ezekial Midgett, or bearer, and on *non est factum* pleaded the defendant objected to the recovery by the plaintiff as the bearer, because the bond was not delivered to him, nor was it a contract with him. Of that opinion was the presiding Judge, and the plaintiff submitted to a non-suit and appealed.

Bodman, for the plaintiff.

Biggs and *Shaw*, for the defendant.

RUFFIN, C. J. The judgment must be affirmed. Although a bill or promisory note may be made payable to A. B. or bearer, or to the bearer, yet a bond cannot. That being a deed, it must be made to some certain obligee, to whom or for whom it may be delivered. In that respect it is like other deeds, which cannot be effectually made to the bearer, that is, to any person who may happen to come into possession of them. There are essential differences between notes and bonds in many respects. The former for instance can be made in blank as to the sum, the payee, the time of payment, and the like, and may be filled up by any person duly authorized, though orally; while a bond must be complete from the beginning in all those respects. The plaintiff cannot sue on this bond, because he is neither named in it as the obligee, nor is it transferred to him by the obligee named. If it be a bond at all, it is so as being payable to Ezekial Midgett, and the words, "or bearer," are unmeaning, and may be rejected as surplusage. That is supposed to be very clearly the law; and then no person can claim the bond but by the assignment of Midgett under the statute. The plaintiff must, then, fail, for want of evidence of a delivery to Midgett, or to any one for him, and also for want of Midgett's endorsement. It was argued, that the effect of the statute, making bonds negotiable, and transferrable

by endorsement, in the same manner as promissory notes, must be to allow this form of a bond, that is, payable to bearer or to A. B. or bearer. But that consequence can by no means follow. On the contrary, the instrument must be a perfect bond before it can be negociated; for, it is only as a bond for money, that it is susceptible of transfer, and then it is by endorsement. No doubt, after it has become a perfect instrument, the obligee can, by his endorsement, order the payment to be made to the bearer; for, in respect to their transfer, notes and bonds are put on the same footing. But their nature, in their inception and before endorsement, is not touched by the statute, and remains, as at common law. The counsel for the plaintiff relied also on the case of *Fairly* v. *McLean*, 11 Ire. 158, as an authority for the validity of such bonds, and that they enure to the benefit of the bearer. But that is a mistake, for the Court then gave no opinion on the question, and could give none. The action was brought for three bonds, of which two were payable to the intestate and the other to him or bearer; and in the Superior Court, it was held, that all three vested in the son by the gift and delivery from the intestate, and yielded the point as to the one payable to him or bearer. The question now under consideration was, therefore, not open to the Court upon that occasion, and that case cannot affect the present.

Per Curiam. Judgment affirmed.

THE STATE TO THE USE OF JUSTICE B. JONES vs. JOSEPH D. BIGGS.

The official returns of a guardian to the County Court of the state of his account with his ward are admissible evidence, in an action against the Clerk of the County Court for neglect of duty in not issuing a *scire facias*, as required by law, to cause the guardian to renew his bond.

The cases of *Armistead* v *Herramond*, 4 Hawks, 339, and *Governor* v *Twitty*, 2 Hawks 5 and 1 Dev 153, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Spring Term 1850, his Honor Judge BAILEY presiding.

The action is debt on the bond, given by the defendant as the clerk of the County Court of Martin, and the breach assigned is, in not issuing a summons to one Redding from January term 1838 to renew his bond, as the guardian of the relator — to which office he was appointed at January term 1836, and in virtue thereof received large sums of money and other effects, belonging to the relator, by reason whereof and the subsequent insolvency of the guardian, the relator sustained damages from the loss of the money and other effects. The defendant pleaded, conditions performed and, *non damnificatus*; and, on the trial, the relator offered the returns made to the County Court, by the guardian, of the estate of the ward in his hands in January 1835, and thence from time to time to 1840, as evidence of the amount of the estate, and of the amount of damage sustained by the relator from the insolvency of the guardian and alleged omission of the defendant. But, upon objection on the part of the defendant,

His Honor rejected the evidence, and the relator submitted to a non suit and appealed.

Rodman, J. W. Bryan and J. H. Bryan, for the plaintiff.
Biggs, for the defendant.

RUFFIN, C. J. The Court is of opinion, that the evidence was improperly excluded. The returns of the guardian stand on the same footing with an inventory by an administrator, which has been repeatedly held to be admissible to charge the administrators' sureties, at the instance of creditors or next of kin. *Armistead* v. *Harramond*, 4 Hawks 339. They are acts required by the law from those persons in the discharge of their official duties, as a mode of charging them upon their own oaths, contemporaneously with their getting the effects in hand or nearly so. They establish the indebtedness of the administrator or guardian, at least *prima facie*, and are much like the return of satisfaction by a sheriff, whereby his sureties are bound. *Governor* v. *Twitty*, 2 Hawks 5. and 1 Dev. 153. These returns constitute natural evidence, arising out of the ordinary course of business, to charge the guardian, and therefore, they tend to shew the extent of the relators' loss by the subsequent insolvency of the guardian, and by consequence, of the damages which by possibility arose from the *laches* of the defendant. It is not like an indebtedness established by judicial sentence, which is *in invitum*. But this is the party's own act against his interest, done not only in the ordinary course of business, but in the most solemn manner, in the prescribed course of official duty.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN R. ANDERSON *ex* LEMUEL R. JERNIGAN.

A reference to the Clerk of the Court to take and report the accounts of an executor, administrator or guardian, can only be made, under the Act of 1826, Rev. Stat. ch. 31, sec. 119, in a suit brought upon the bond given by such executor, administrator or guardian for the faithful performance of his duty.

The case of *Lynch* v. *Johnson*, 11 Ire. 230, cited and approved.

Appeal from the Superior Court of Law of Hertford County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

The suit was commenced by warrant in debt on a former judgment for $45 66, and, on the trial, the defendant suggested the want of assets to the magistrate, who endorsed the suggestion on the warrant, and gave judgment for the plaintiff for the debt demanded and interest and costs, and returned the proceedings to the County Court. The defendant appeared and pleaded, no assets, and *plene administravit*, and issue was taken thereon. By the consent of the parties an order was then made, referring it to the Clerk to take and state an account of the personal estate of the intestate, in the hands of the defendant, or for which he ought to be liable to the plaintiff in this suit. The Clerk made his report to the next term, by which it appeared that the defendant had fully administered, and that a small balance was due from the estate to the defendant. The plaintiff took several exceptions to the report, which were overruled; and then the Court confirmed the report, and the plaintiff appealed to the Superior Court. In the lat-

ter Court his Honor overruled all the plaintiff's exceptions but one. That he allowed, and, by doing so, the balance of the account was changed so as to make the defendant debtor to the estate of his intestate in the sum of $7 60; and, for that sum and the costs, there was judgment against the defendant, from which he appealed.

B. F. Moore and Barnes, for the plaintiff.
Bragg and Smith, for the defendant.

RUFFIN, C. J. The reference was not to the Clerk as an arbitrator. The parties did not treat the report as an award, and it is plain, that it was not so intended to be. The purpose was to proceed under the act of 1836, upon the supposition that the case was within it, as was done in *Lynch* v. *Johnson*, 11 Ire. 224, and there held to be erroneous. Issues were joined in the record for the jury, and there has been no trial of them; consequently the judgment, thus rendered without a verdict, must be reversed, and the cause remanded for further proceedings according to law.

PER CURIAM. Judgment reversed and cause remanded.

WILLIAM ADKINSON *vs.* SAMUEL W. SIMMONS.

Under the book debt law, Revised Statutes, chapter 15, in order to entitle the party to recover, he must swear, not only that he "sold," but also that he actually "delivered," the articles for the price of which the suit is brought.

Appeal from the Superior Court of Law of Bertie County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

This is a warrant for a sum due by account, and the claim of the plaintiff is for the price of 5 stacks of fodder, sold and delivered. Plea, non assumpsit; and on the trial in the Superior Court, the plaintiff proposed to prove his demand under the Book debt act. On being sworn, he stated, amongst other things, that he purchased five stacks of fodder from a neighbour, and that the defendant knew of the purchase and knew the fodder; that a few days thereafter the defendant and he met at a place, about seven miles from the fodder, and the former proposed to purchase it, and the plaintiff offered to take $2 85 per stack for the whole; that the defendant wanted time to examine the fodder, but the plaintiff told him, that he must either agree then to take it or he could not have it at all, as he, the plaintiff, must sell it or move it, and he wished to have no further trouble with it; that thereupon the defendant said, 'I will take it," and the plaintiff replied, "then it is your fodder," to which the defendant said "yes." The plaintiff further stated, that he did not know that the fodder ever went into the defendant's possession, or that he ever exercised any dominion over it.

On that statement the Court refused to admit the plaintiff's book in evidence, and held that the plaintiff could not recover, and from a judgment against him he appealed.

Smith, Winston, Jr., and Bragg, for the plaintiff.
A. Moore, for the defendant.

RUFFIN, C. J. The book was properly excluded, and there was no evidence competent to establish the demand. Although assumpsit may lie for the price of goods bargained and sold, yet it must be sustained by disinterested witnesses. It is only in suits for "goods sold, and delivered," that the plaintiff and his book are made competent by the statute. The act is express upon that head. It repeats more than once, that the delivery, is to be proved; saying, that if the plaintiff will declare on oath, that he hath no means "to prove the delivery of such articles" as he professes to prove by his own oath but by his book; and also, that the articles contained in the book, and by him so proved "were *bona fide* delivered;" then, the book and oath shall be received, "as good evidence for the several articles so proved to be delivered." Rev. St. Ch. 15. It is clear, therefore, that there must be a *bona fide* or actual delivery established by the party's oath, before he can recover on the evidence of his oath and book; and the reason seems manifest. It is to lessen the danger of perjury, by the departure from the rule of the common law, whereby a party was excluded from being a witness for himself. For, there would be great danger in allowing one to prove for himself special agreements for sales, unaccompanied by acts, openly denoting the change of property. It is a wholesome provision, therefore, that the oath, as to the contract of sale, should be corroborated by the further oath of the party to the delivery of the thing, since, if false, the falsehood in the latter point is much

more open to detection than in the former, and in the same proportion the temptation to perjury and its frequency are diminished. There was not only no delivery in this case, but the defendant, not having paid or tendered the price, wss not even entitled to the possession. 2 B. Com. 448.

PER CURIAM. Judgment affirmed.

WILLIAM D. SMITH *vs.* JOSHUA BRYAN.

Where A. brought an action to recover the amount of a bill of exchange, which he had drawn on B. in favor of C., and which had been accepted by B. and afterwards come into the possession of A. without endorsement, *Held*, that A. could not recover on a count on the bill, because it had not been endorsed to him; and that he could not recover on a money count, without shewing either that the bill had been endorsed to him or in blank, or that he had been obliged to pay the money in consequence of his liability as drawer, or that they had accounted together and the acceptor been found indebted to the drawer in the amount of the bill.

Appeal from the Superior Court of Law of New Hanover County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

The declaration is in assumpsit and contains two counts; one, on the acceptance of a bill of exchange, drawn by the plaintiff on the defendant in favor of Randolph McMillan, or order, and endorsed by him to the plaintiff; and the other, on an account stated. Plea, non assumpsit; and on the trial the plaintiff proved the acceptance and rested his case; and the counsel for the defendant then

insisted, that the plaintiff could not recover. But a verdict was rendered for the amount of the bill and interest, upon an agreement, that judgment should be entered on it, if the Court should think the plaintiff entitled to recover on either count; and, if not, that the verdict should be set aside and a non-suit entered. His Honor was afterwards of opinion, that the plaintiff could not recover on the bill, but that he could on the other count. Judgment was entered accordingly, and the defendant appealed.

No counsel for the plaintiff.

D. Reid, with whom was *Strange*, for the defendant, referred to the following authorities:

1 *Stephen* 948. *Bayley on Bills* 392. 1 *Saund.* 287. 4 *Phil. E. American Notes*, 15 2 *Starkie on Ev.* 182.

And commented on the cases, *Thompson* v. *Morgan*, 3 *Camp.* 101. *Rhodes* v. *Grist*, 5 B. & A. 244.

Ruffin, C. J. As the bill was payable to the order of McMillan, the plaintiff could make a title to it, only through his order. Indeed, the plaintiff declared as the endorsee of McMillan. The omission to prove the endorsement was, therefore, fatal to the count on the instrument.

The proof seems to be equally defective on the second count. The drawer of a bill in favor of another person has an action on it against the acceptor, upon its being returned for non payment; and, in such a case, the bill may be evidence upon the common counts. But, when the drawer brings such an action on the bill, the declaration states not only the drawing of the bill, and its acceptance, and the non payment by the defendant, but also that the plaintiff thereby became liable, as drawer, and paid it. *Symmond* v. *Parminter*, 1 Wil. 185.—*Bayley on Bills* 392, and the cases collected in 1 *Saund. Plead. Ev.* 278, note, 287. It is therefore indispensable

on such a count to prove the payment of the bill, or, at the least, to prove the payee's name in blank on the bill, as an authority to fill up a receipt to the plaintiff for its amount; for the mere possession of the bill, payable, and therefore belonging, to a third person, is not evidence that the drawer has got it up by paying it, so as to entitle him to sue on it. If a bill be payable to the drawer's own order and he transfers it by endorsement, and, afterwards, becomes the holder again, he may then have an action on it, against the acceptor, because by the possession he stands, *prima facie*, on his original rights—like the payee of a promissory note, who loses it, and gets it back again, for, by striking out the endorsements, the holder in each case has the apparent legal title. But it is otherwise between the drawer, and acceptor of a bill payable to another, for the drawer has no original right to the instrument nor against the acceptor, but only the right arising out of his secondary liability in the event of non-payment by the acceptor on due presentment. Hence, the necessity, as before mentioned, that the drawer should show such failure by the acceptor, and that he, the drawer, paid the money, in order to entitle him to sue on the bill.—Then, if the plaintiff had declared on the bill, upon his own right as the drawer, instead of endorsee of the payee, he could not have recovered for want of requisite proof. The same reasons apply equally to the count on the *insimul computassent*, and, indeed, to all the money counts; for the possession of the instrument—belonging upon its face to another person—is no evidence that the drawer, more than any other stranger happening to get hold of the bill, was liable on it and had been duly compelled to pay it, so as thereby to found a presumption, that he had lent the acceptor money, or paid it for his use, or that they had accounted together and the acceptor been found to be the drawer's debtor to the amount of the bill. There is in that case no direct liability of the acceptor to the draw-

er; and, consequently, no such privity as can authorize the implication of the promises supposed in the common count.

The judgment must be reversed, and judgment of nonsuit be entered, according to the agreement in the record.

PER CURIAM. Judgment accordingly.

THOMAS C. WILDER *vs.* RICHARD B. CREECY & AL.

Where a person hired a negro to another, and one of the stipulations at the hiring was, "that the negro should not go by water," and the person, who hired the slave, permitted others to use him and by them he was employed on the water, in consequence of which he lost his life, *Held*, that these latter persons were not answerable in damages, for the loss of the slave to the original hirer; for the stipulation was merely personal, and in no way attached to the slave.

Appeal from the Superior Court of Law of Chowan County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

The action is trover for a negro slave, Alfred, with a special count in case on the following facts, which appeared at the trial on not guilty pleaded. One Fenill hired the slave from the plaintiff for the year 1846, and one of the terms of the hiring was, that the negro "should not go by water." Fenill placed this and other slaves for the year under the chaage of one Carter, his brother in law, at a place situated on Albemarle Sound, and, in the month of December of that year, the defendants, Creecy

and Pool, hired Alfred and some other slaves from Carter to assist in getting out and delivering some corn (which they had at Carter's, and had sold) on board a vessel lying at anchor, about three or four hundred yards from the shore. Those defendants put the hands under the other defendant, Gregory, and he, by the consent of Carter, sent Alfred on board the vessel to assist in stowing away the corn in the hold, and he worked there one day and went on shore at night. The next day he returned to the same employment, and worked at it until evening; when the Captain of the vessel, then being on shore, stated to Carter, that he thought there was about to be a storm, and said that he would go aboard, and send Alfred ashore, but Carter told him he need not send the boy ashore, as he might be of service in case a storm should come on. The Captain went aboard and did not send Alfred ashore, and a storm came on that night, and during its continuance the slave died from fright or cold, or their combined effects. On the part of the plaintiff objection was made to the admission of the conversation between the Captain and Carter, but the Court received it. The plaintiff gave evidence that the hiring by Fenill was as the highest bidder at a public hiring, and that the defendant, Pool, was at the place of hiring, when the terms were made known, and hired another negro at that hiring.

The Counsel for the plaintiff moved the Court to instruct the jury, that, if they believed the defendants knew of the terms, upon which Fenill hired the boy Alfred, it was a wrongful act in them to send him aboard the vessel, for which the plaintiff was entitled to recover. But the Court refused to give the instructions payed for, and directed the jury that, upon the facts, as stated, the plaintiff was not entitled to recover. The plaintiff then submitted to a non-suit and appealed.

Heath, for the plaintiff.

A. Moore, for the defendant.

Ruffin, C. J. The opinion of the Court concurs with that given by his Honor. By the hiring the property vested for the term in the hirer, and the plaintiff had the reversion only. The stipulation, that the slave was not to go by water, was not a limitation to the estate of the hirer, whereby it would be determined and the property be revested in the plaintiff, nor even a condition, which would have authorised him to determine the hiring and resume the possession, but merely an engagment of the hirer not to expose the slave to the hazards of employments on the water. As the plaintiff had but the reversion at the time of the slave's death, that by itself defeats the count for trover. For much the same reasons the other count must also fail. As a stipulation it was personal merely, and did not attach to the slave, in the nature of a covenant running with land. The knowledge or ignorance of its existence could not make it more or less binding upon one not a party to it, as the assignee of the property can in no degree be affected by it. It would expose third persons to great damage, and, indeed, prevent much of the traffic of life, if they were charged with the consequences of collateral engagements of this kind, between persons, who let or take on hire; and therefore their obligation is wisely restricted to the parties themselves. The evidence objected to was competent to show, that the negro was on board the vessel by the direction, or account of Carter, the person in possession.

Per Curiam. Judgment affirmed.

DEN ON DEMISE OF JAMES W. MURRELL *vs.* JAMES E. ROBERTS.

A reversion in fee, after a term for years, is the subject of execution; the sheriff's deed is as effectual to pass it as that of the reversioner; and the tenant, who claims under such deed, is not estopped from setting it up as a bar to an action of ejectment by the reversioner.

Payment to the sheriff discharges an execution; and a subsequent sale of property under such execution is void, and conveys no title to the purchaser.

Appeal from the Superior Court of Law of Brunswick County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

The lessor of the plaintiff was seised of the premises in fee on the first day of January 1843, and then leased them to one John Smith for the term of six years. The plaintiff gave evidence, that Smith entered and executed a deed in fee in 1846 to one Dudley, under whom the defendant was in possession at the commencement of this suit in April 1849.

On the part of the defendant evidence was then offered, that one Sullivan obtained a judgment in debt against the lessor of the plaintiff and another person, on which a *fieri facias* was issued, by virtue of which the premises were sold in 1846 by the sheriff, and conveyed in fee to the said Smith, and that he afterwards conveyed to Dudley.—This evidence was objected to on the part of the plaintiff, upon the ground, that Smith was estopped to deny the lessor's title or withhold the possession from him at the expiration of the term, and that the defendant, who claim-

ed under Smith, was likewise so estopped. But the Court received the evidence, and thereon instructed the jury, that Smith had a right to purchase the premises at the sale by the sheriff, and that the title thereby derived might be set up against the plaintiff as a bar in this action.

On the part of the plaintiff further evidence was then offered, that, while the sheriff had the *fieri facias* in his hands and before the sale of the premises, the whole sum due thereon was paid to the sheriff by one of the defendants therein, in satisfaction thereof. But upon objection on the part of the defendant, the Court refused to receive the evidence, upon the ground, that it was not competent thus to impeach the title of the purchaser at the sheriff's sale.

After a verdict and judgment against the plaintiff, he appealed.

Strange, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. There is no error on the first point. The defendant did not attempt to set up a title, in derogation of that of the lessor of the plaintiff, at the time of his lease to Smith. On the contrary, he acted in affirmance of that title, by showing the subsequent acquisition of it by Smith, so that both the term and the reversion became united in him. If the lessor of the plaintiff had, by his deed, assigned the reversion to Smith, the title thus derived might be set up as a bar to this action. It must be the same under the sale by the sheriff; for a reversion in fee, after a term for years, is the subject of execution, and the sheriff's deed is as effectual to pass it as that of the reversioner. On the other point, however, the Court holds, that there is error. Payment to the sheriff, discharges the execution. If the sheriff have a *ca. sa.* and after payment by the debtor, within his knowledge, he, the sheriff, arrest

him, it is, undoubtedly, false imprisonment. It must also be illegal to act on a *fi. fa.* after satisfaction to the sheriff, and he is a trespasser, if he seize goods afterwards. *Lefans* v. *Mooniscun*, 1 Hob. 685 As was said in the case cited at the bar, the execution became thereby *functus officio*, *Hammett* v. *Wyman*, 9 Mass. Rep. 138. It follows that a subsequent sale under it is void, and it was so held in that action, which was trespass by the purchaser at that sale, for a second taking of the goods, upon another execution against the same defendant. If it were not so, the sheriff might, upon another execution for a trifling sum, ruin any person, since he might raise the money over and over again by sale after sale. For, there is no difference between satisfaction by a payment by the debtor in money and one by the sale of his property. After satisfaction to the sheriff in either way, he cannot lawfully seize and sell property, more than he could, without having had an execution at all.

Per Curiam Judgment reversed and *venire de novo*.

NATHANIEL TAYLOR *vs.* JONAS AND WILLIAM SPIVEY.

Where to an action on a justice's judgment the defendant pleads "the statute of limitations," the plaintiff cannot reply a new promise within the seven years. The replication of a new promise is confined to actions "on promises."

Appeal from the Superior Court of Law of Gates County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

Jordan, for the plaintiff.
A. Moore, for the defendants.

PEARSON, J. This was a warrant on a former judgment of a single justice. The defendants relied on the statute of limitations. The plaintiffs in the replication alleged a new promise within the seven years. His Honor correctly decided, that the statute could not thus be met. The replication of a new promise is confined to actions "on promises." This is settled in this State and England.

The other instructions were uncalled for; at all events the plaintiff has no right to complain of them.

PER CURIAM. Judgment affirmed.

JOHN NIXON ET. WILLIAM P. LONG.

Where one has a cause of action against another, accruing *after a demand* made, the suing out of a writ for that cause of action, though the writ was in assumpsit, when it should have been in covenant, is a demand in the strongest form.

The case of *Lynn* v *McLelland*, 4 Dev & Bat 459, cited and approved.

Appeal from the Superior Court of Law of Perquimans County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

This is an action of covenant, upon a guaranty under seal, dated September 12, 1845, of a note executed by one Halsey for two hundred and fifty dollars, payable to the defendant. The note was executed in July 1845, and fell due on the 1st of January 1846. On the 13th of April 1844, Halsey executed a deed in trust to Badham, conveying the greater part of his property to secure debts due to sundry persons, amounting to five thousand dollars or thereabouts; and, on the 11th of April 1846, the said Halsey executed another deed in trust to one Norcom and one Benbury, embracing all the balance of his property of every description and the interest thereon, including fourteen negroes, not conveyed in the deed of 1844, to secure debts due to sundry persons, amounting to a much larger sum, than those secured in the deed of 1844. It was proved on the trial, that Halsey was reputed to be entirely insolvent, from and after the execution of the deed of 1846, and that, on the sale of all his property in December 1848, by the said trustees, it fell short of paying the debts secured in the sum of six thousand dollars. It

also appeared, that in March 1849, the plaintiff made a demand on Halsey to pay the said note; that, in May 1849, the plaintiff, by his counsel, sued out a writ in assumpsit on the said covenant, returnable to May Term of Perquimans County Court (the second Monday of May) and returned "executed;" that his counsel moved the Court to change the said writ from case to covenant, which motion was refused, and the plaintiff submitted to a non-suit. Whereupon the present suit was brought, returnable to August Term 1849 of Perquimans County Court.

The defendant offered to prove by parol, that it was a condition of the said guaranty, that suit should be brought by the plaintiff on the note in question. The evidence was rejected by the Court.

The Court charged, that the plaintiff was bound to use the same degree of diligence in collecting the note from Halsey, that a prudent man would use in collecting a debt of his own; that, if he had failed to do so, then the defendant was entitled to their verdict The Court further charged, that the suing out of the writ in May 1849, though not in proper form, was such a demand on the defendant, as would satisfy the law. To this latter part of the charge the defendant excepted. After the jury had been out sometime, they returned into Court, and asked, if the said note was not secured in the deed of trust of April 1846; to which the Court answered, that the deed embraced a debt of two hundred and fifty dollars, the balance due on two notes, and there was no other evidence, that it embraced the note of two hundred and fifty dollars, now the subject of litigation To this answer of the Court to the interrogatory of the jury the defendant excepts. The defendant also excepts to the opinion of the Court, in rejecting the parol evidence.

The jury returned a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

A. Moore, for the plaintiff.
Heath and Jordan, for the defendant.

PEARSON, J. The defendant offered to prove by parol, that it was a condition of the covenant, that Nixon was to bring suit on the note. The Court rejected the evidence, and to this the defendant excepts. There is no error. We can see no reason for making an exception, in this case, to the rule, that a written instrument cannot be added to, varied, or explained by parol proof.

The Court charged, that, suing out the writ in May 1849, although it was not in proper form (being in assumpsit,) was a sufficient demand. To this the defendant excepts. There is no error. The writ, issued in May 1849, was for the *same cause of action*, and amounted to full notice and was in fact a demand in the strongest form. *Linn* v. *McLelland*, 4 Dev. & Bat. 459.

We can see no force in the exception to the answer made by the Court to the interrogatory of the jury; it was simply, a recital of the evidence on that point. These are the only points presented by the case.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF MARTHA DUCKET & AL. *vs.* CHARLES W. SKINNER, JUN.

The County Court, on the petition of the guardian of a certain infant, passed the following order—"Ordered that he, the said W. B., guardian, sell the land of said deceased T. H., or so much thereof as will be sufficient to discharge the debts." *Held*, that this order was unauthorized and void, and, of course, that a purchaser under it acquired no title.

The case of *Leary* v *Fletcher*, 1 Ire. 259, cited and approved.

Appeal from the Superior Court of Law of Perquimans County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

In this action of ejectment, the following facts appeared:

Thomas H. Harvey died in 1808, seized of the premises in fee, and left an only child, Mary Eliza, who married under the age of 21 years, and died under coverture, leaving two children, who are the lessors of the plaintiff and were infants when this suit was brought. In May 1809, William Blount was duly appointed the guardian of Mary Eliza Harvey, by the County Court of Perquimans, and at the same time the Court passed an order in the words following: "Ordered that he, the said William Blount, guardian, sell the land of said deceased Thomas Harvey, or so much thereof as will be sufficient to discharge the debts." In pursuance of that order, the premises described in the declaration were sold by the said Blount, at public sale, to a person, under whom the defendant came in, and was in possession at the commencement of this action.

On the foregoing statement, as a case agreed, the cause was submitted in the Superior Court, upon an agreement, that, if the Court should be of opinion, the plaintiff was entitled thereon to recover, judgment should be entered for him for the term and six-pence damages and costs; and, if otherwise, that there should be judgment for the defendant. Judgment was given for the plaintiff, and the defendant appealed.

No counsel for the plaintiff.
A. Moore, for the defendant.

Ruffin, C. J. The case is very defectively stated: omitting, for example, to set forth, that the purchaser did or did not take a conveyance. But it is not material to advert to those considerations, since, supposing the best for the defendant on every thing not stated, it appears affirmatively, that his title is essentially defective, by reason that the order for the sale was unauthorised and void. The case of *Leary* v. *Fletcher*, 1 Ire. 259, is a direct authority to that point, and renders further discussion of the principle unnecessary.

Per Curiam. Judgment affirmed.

FRANKLIN F. FAGAN *vs.* THOMAS S. ARMISTEAD.

Where several cases have been decided upon the same question, after argument, the Court will not reconsider the grounds of those decisions, especially upon a case presented without argument.

That "all waters, which are actually navigable for sea vessels, are to be considered navigable waters, without regard to the ebb and flow of the tide, and that no one is entitled to the exclusive right of fishing in any navigable water, unless such right be derived from an express grant by the sovereign power, or, perhaps, by such a length and kind of possession, as will cause a presumption of such grant to arise," must now be deemed the settled law of this State.

A common informer cannot recover a penalty, unless he sue within the period allowed by the act imposing the penalty. As where a penalty is imposed on persons fishing in the Roanoke river at certain times, and any person may sue for the same, provided he does so within one month from the forfeiture, and if no such suit is brought within that period, the law-officer of the State is directed to sue for the use of the State, (act of 1827, ch. 54,) it was held that, after the expiration of the month, the right of the common informer was gone.

The cases of *Wilson* v *Forbes*, 2 Dev. 30, and *Collins* v *Benbury*, 3 Ire. 277 and 5 Ire. 118, cited and approved.

Appeal from the Superior Court of Law of Washington County, at the Fall Term 1849, his Honor Judge BAILEY presiding.

This is debt for $250, claimed as a penalty for fishing in Roanoke river with a seine, contrary to the act of 1827, C. 54, entitled "an act to prevent the obstruction of fish passing up the Roanoke and Cashie rivers and their waters." Pleas, *nil debet*, and statute of limitations. By the act, every person, owning and using a seine for the purpose of catching fish in either of the rivers, is required to take

it out of the water and let it remain out from twelve o'clock on Saturday until 12 o'clock on Monday of each week, from the 1st day of March to the 25th, of May in every year, and it is enacted that any person, who shall violate that provision, shall forfeit for each offence the sum of $250, to be recovered by any person who shall first sue for the same: one half for the use of the informer and the other half for the use of the poor of the County; with a proviso, that if no person shall sue for the penalty within one month from its forfeiture, then that the Solicitor for the State shall sue for the same in the name of the Governor, for the use of the State.

The writ was sued out on the 24th of May 1849, and on the trial the parties made up the following case agreed. The defendant was seized in fee simple in possession of a tract of land lying on Roanoke river, and consisting entirely of marsh or swamp land, destitute of timber and valuable only for its fishing privilege and used for no other purpose, to which he derived title under a patent which issued before the year 1827: Roanoke river in front of said land is a fresh water stream, about 300 yards wide, from ten to twelve feet deep, and affords, with the sounds, unobstructed navigation for sea vessels to the ocean; but it has not there, nor for many miles down the river, any ebb, or flood of the tide. On the 16th day of April 1849, between the hour of 12 o'clock on Saturday, and 12 o'clock on Monday next following, the defendant, being the owner of a seine, put it into the water of Roanoke river in front of his said land, and hauled it ashore on his land aforesaid, enclosing, landing, and catching therewith a quantity of shad and herrings. On this case the opinion of the presiding Judge was in favour of the plaintiff, and judgment was entered for him, and the defendant appealed.

No counsel for the plaintiff.

Heath, for the defendant.

RUFFIN, C. J. The case has not been argued, but it seems probable, that it was framed with a view to obtaining the opinion of the Court upon the questions, whether the land of the defendant is bounded by the Roanoke at the water's edge or by a line along the thread of the stream, and, if the former, whether the Legislature can restrict him in the use of it, as enacted in the statute.— The latter point is immaterial to the defendant, if the former be against him, and that it is against him the cases of *Wilson* v. *Forbes*, 2 Dev. 30, and *Collins* v. *Benbury*, 3 Ire. 277, and 5 Ire. 118, are direct authorities. Although we might have been willing to hear another argument on the point, and to have reconsidered it, if the argument should raise a doubt on it, yet it is too much to expect the Court, without argument, to go over the whole subject of themselves, and reverse a series of adjucations made upon solemn arguments. We think it our duty to adhere to those decisions, under the circumstances, simply upon their authority, and therefore the judgment would be affirmed, if it were not for another objection, which appears on the record, and is deemed fatal to the action. It is, that the suit was not brought in due time, and therefore cannot be maintained. A common informer cannot recover a penalty, unless he sue within the period allowed him by the act, as it forms a part of his title. The general rule is, that a penalty imposed by statute belongs to the sovereign, unless the right to sue be given to some one else. Here, the enacting clause gives it to the person first suing for it, subject only to the limitation in point of time by the general act of 1808. But the proviso makes it the duty of the public law-officers to sue for the use of the State, if no private person shall have sued within one month from the forfeiture. As the right is thus reserved to the State after that period, it is an unavoidable implication, that individuals are excluded from it after the same period. This suit was not brought until the 24th of May,

although the forfeiture was on the 16th of April; and for that reason the judgment must be reversed, and judgment entered for the defendant, according to the case agreed.

PER CURIAM. Judgment reversed and judgment for the defendant.

THE STATE TO THE USE OF FERRAND'S EX'RS *vs.* SHEPARD W. BURCHAM & AL.

When a constable is appointed by the County Court at May Term, his appointment expires at the next February Term, which is the regular time prescribed by law for the qualification or appointment of constables.
The case of the *State* v *Wilroy*, 10 Ire. 330, cited and approved.

Appeal from the Superior Court of Law of Carteret County, at the Spring Term 1849, his Honor Judge BATTLE presiding.

J. H. Bryan and J. W. Bryan, for the plaintiff.
No counsel for the defendants.

PEARSON, J. This was an action of debt upon a constable's bond.

The defendant, Burcham, was appointed constable at May term 1843, (no appointment of constable for his district having been made at February Term.) The claim, for which this action is brought, was put into his hands

in March 1844. It was insisted, that Burcham's term of office expired at February Court 1844, and it was so decided, and the plaintiff appealed. We concur in the opinion. February term is the time fixed on, by law, for the appointment of constables, and if one is appointed at a subsequent term, his term of office expires at the next February term.

This is the construction given to the statute in *State* v. *Wilroy*, 10 Ire. 330. There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

WILLIAM C. LOFTIN *vs.* GEORGE W. KORNEGAY & AL.

Where three are sued in debt, and one of the defendants, not contesting the plaintiff's right to recover, pleads that he is a co-surety of one of the other defendants, and a verdict is found against him, it is very doubtful whether he can appeal at all; but certainly he cannot appeal alone.

Appeal from the Superior Court of Law of Lenoir County, at the Fall Term 1850, his Honor Judge ELLIS presiding.

W. H. Wright and J. H. Bryan, for the plaintiff.
No counsel for the defendant.

PEARSON, J. This was debt on a note, executed by Kornegay, Davis and Jarman. The defendants did not resist the plaintiff's recovery; but Jarman "pleaded"

that he was the surety of Kornegay and Davis. Davis "pleaded" that he and Jarman, were sureties of Kornegay.

The jury returned a verdict for the plaintiff, and found that Jarman was a co-surety with Davis. From the judgment rendered on this finding, Jarman was allowed to appeal, the other defendants not objecting.

This proceeding is under the sec. 131, 132, ch. 31, of the Revised Statutes. The "pleas," as they are called, do not contest the plaintiff's right to recover, but merely raise a family dispute between the defendants, in which the plaintiff has no concern. It is very questionable whether the right of appeal is given in such cases, as an appeal must necessarily delay the plaintiff's admitted right of recovery. But in this case, the appeal is only taken by the defendant Jarman, and it is settled that one of two defendants cannot appeal. In such cases it is hardly to be expected that the other defendant will join in the appeal, as he has no reason to complain of the result.

PER CURIAM. Appeal dismissed.

WILLIAM W. GRIFFIN *vs.* DANIEL RICHARDSON

A., by a *bona fide* deed proved and registered in May 1843, conveyed a slave to B. in trust to secure the payment of certain debts. B. by deed, conveyed the slave to C. for a certain price, all of which was afterwards paid by A. except $100. C. then by deed dated in 1847, and proved in 1849, in consideration of the said $100 conveyed the slave to D. *Held*, that, though D. might have taken that conveyance in trust for A. upon the payment of the $100, yet while the property remained in that situation, the $100 not being paid, A. had no such interest as was liable to an execution against him.

Estoppels must be mutual, and bind only parties and privies. One, who is not bound by an estoppel, cannot take advantage of it.

The case of *Gowing* v *Rich*, 1 Ire. 553, cited and approved.

Appeal from the Superior Court of Law of Pasquotank County, at a Special Term in December 1850, his Honor Judge BATTLE presiding.

This was an action of detinue for a negro slave named Mary. Plea, *non detinet*. Upon the trial, both parties claimed under Stephen D. Pool, to whom the slave in question formerly belonged. The plaintiff exhibited a deed in trust from the said Pool to William L. Shannonhouse, dated, proved and recorded in 1843, the trust being for the payment of certain debts therein named.—Shannonhouse, the trustee, sold the slave at public auction, to Samuel J. Proctor for $625, and conveyed her by bill of sale for that consideration. Proctor, afterwards, conveyed the slave to the plaintiff, by deed dated in November 1847, and recorded in March 1849. In this deed the consideration is stated to be five hundred dollars, and it is recited that the property had been conveyed by the

said Proctor to J. C. B. Ehringhaus in trust, by a deed bearing date in December 1843, and duly registered. The plaintiff further proved a demand and refusal.

The defendant then produced the record of a judgment against the said Pool, rendered by the County Court of Pasquotank, at December Term 1848, on a note bearing date in August 1848. He then shewed an execution, issued on the said judgment, proved a sale made under it by the sheriff on the 17th of February 1849, and produced the sheriff's deed to himself. He then called as a witness Samuel J. Proctor, who testified, that the slave, Mary, remained in the possession of Pool, from the time of his execution of the deed in trust to Shannonhouse, until she was sold by Shannonhouse; that he, the witness, purchased her for the benefit of the said Pool, intending, however, to retain the title until her purchase money should be repaid; that payments were made by some person, (it was alleged to be by Pool,) until the sum was reduced to one hundred dollars, with a small amount of interest accrued thereon. He testified further, that, when he was about to sell the slave to the plaintiff, he and Pool were at the plaintiff's office, and Pool said to him in the plaintiff's presence, that he, the plaintiff, had befriended him before, and that he was willing to do it again, and that the plaintiff would pay him one hundred dollars for the said slave, and keep the title as collateral security, until Pool should be able to repay him; and that he, the witness, received the one hundred dollars from the plaintiff and executed the bill of sale above referred to. This witness testified further, that the debts, mentioned in the deed in trust from Pool to Shannonhouse, were fair and *bona fide*. It was also in evidence, that Pool was reputed to have been insolvent, for some years prior to 1848, but no witness testified to the existence of any debt, owing by him in 1843, which was not embraced in the said deed in trust. It was proved, also, that the slave remained in

Pool's possession, until she was levied upon by the sheriff. The defendant contended, that the plaintiff was estopped, by the recital in the bill of sale from Proctor, to shew that the title was not in Ehringhaus. But the Court was of opinion, that the plaintiff could not be estopped by a deed, which the defendant objected to as void. The defendant then insisted, that the plaintiff's bill of sale was not registered, until after the time the lien of his execution had attached, and that it was fraudulent and void, because it was absolute on its face, whereas, he contended, that it was made in trust for Pool. He contended further, that it was void, as was also the deed in trust from Pool to Shannonhouse, because Pool had been permitted to retain possession.

The Court was of a different opinion upon all these points, and charged the jury, that the plaintiff was entitled to recover. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

B. F. Moore and Ehringhaus, for the plaintiff.
Heath, for the defendant.

Pearson, J. In May 1843, Pool conveyed the slave to Shannonhouse, in trust to pay certain debts. Soon thereafter, Shannon sold the slave, at public auction, to Proctor, who paid for her by putting his note in bank for the price $625, in satisfaction of a debt secured by the trust. Pool continued in possession and made sundry payments upon Proctor's note in bank, so as to reduce it to about $100. In November 1847, Proctor, upon the payment of the $100 by Griffin, conveyed the slave to him. In December 1848, a judgment was taken againt Pool, and the slave was levied upon as his property, and sold by the sheriff to the defendant, in February 1849.

The Court was of opinion that the plaintiff was entitled to recover. We concur in the opinion. The deed

of trust, which is *admitted to have been bona fide*, passed the title out of Pool, and the sale by Shannonhouse passed it to Proctor, who passed it to Griffin, the plaintiff.

Admit that Proctor took the legal title in trust for Pool, after the payment to himself of $625. Admit that, under this arrangement, Pool reduced the debt to $100, and then Proctor, upon the payment of that sum by the plaintiff, conveyed to him and that he took the title to secure the $100, and then in trust for Pool. The latter had no such interest as was liable to execution, *Gowing* v. *Rich*, 1 Ire. 553. Nor does the fact, that Pool continued in possession during all the time, make it a fraud under the statute of Elizabeth. That statute never applies, except when the original transfer by the debtor is fraudulent, so that, by treating it as void against creditors, the title will still be in him. Suppose, on account of the benefit intended for Pool, the deeds to Griffin and Proctor are both treated as void. The title is in Shannonhouse, who is admitted to have acquired it without fraud and Pool has only such an interest as can be reached in Equity.

The question of estoppel does not arise. The defendant was not a party, or privy to either of the parties, in the deed by Proctor to the plaintiff, in which there is a recital of a deed by Proctor to one Ehringhaus or in the deed referred to in the recital. Estoppels must be mutual, and bind only parties and privies. One who is not bound by an estoppel cannot take advantage of it.

PER CURIAM. Judgment affirmed.

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JACOB LASSITER *vs.* HYRAM WARD.

In an action on the case, a count in deceit, for knowingly misrepresenting the soundness of a chattel, may be joined with a count for the breach of a warranty of the soundness of the same chattel.

Appeal from the Superior Court of Law of Montgomery County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

This is an action on the case in *tort*, and the declaration contains two counts. The first is in the usual form for a deceit in selling the plaintiff an unsound horse, by falsely representing him to be sound, he, the defendant, then and there knowing him to be unsound; and the second, for a false warranty of soundness of the horse. Plea, not guilty. On the trial, the evidence was, that the defendant warranted the horse to be sound, and that he was in fact not sound. The counsel for the defendant then insisted, that the plaintiff could not recover for want of proof, that the unsoundness was known to the defendant. But the Court held, that the plaintiff might recover on the second Court without proving a *scienter*. The jury gave a verdict for the plaintiff, and the defendant moved for a *venire de novo*, on the ground of error in the opinion of the Court, which was refused. A motion was then made in arrest of judgment, upon the ground, that the two counts could not be joined. That was also refused, and judgment given on the verdict, and the defendant appealed.

Winston, Sen., and Miller, for the plaintiff.

Dargan and Mendenhall, for the defendant.

Ruffin, C. J. Though one would expect assumpsit to be brought on a warranty of goods, as well as any other parol contract, yet it is, comparatively, a recent thing that it was brought in such cases. Its propriety seems to have been questioned as late as the cases of *Stewart* v. *Wilkins*, Doug. 18; and it cannot be said to have been judicially settled earlier, though the action had been sometimes brought. It was questioned on the ground, that the action on the case in *tort* was the established remedy, and, therefore, the proper one. It was, however, held that either of the actions would lie upon an express warranty. Afterwards it was attempted to give another turn to the matter in the opposite direction, namely, by contending that assumpsit was the peculiar remedy on a false warranty, and that the declaration could not be in *tort*, unless it alleged a *scienter*; which was as much as to say, that the action on the case would not lie on the warranty, but only on the cheat. *Williamson* v. *Allison*, 2 East 446. But there were so many precedents of actions in *tort* for a false warranty, as to show clearly, that it had been formerly the common remedy, if not the only one, in use, and to induce the Judges to sustain it. It was, accordingly, there held that the declaration might be in *tort* without alleging a *scienter*, and, if it be alleged in addition to the warranty, that it need not be proved. The doctrine of the case is, that, when there is a warranty, that is the gist of the action, and that it is only when there is no warranty that a *scienter* need be alleged or proved. It is nearly half a century since the decision, and during that period, the point has been considered at rest, and many actions have been brought in *tort*, as well as *ex contractu*, on false warranties. 1 *Chit. Pl.* 956, 420, 2 *Chit Pl.* 270. There is no doubt as to the propriety of joining the two counts; for, it is an action on the case, and the counts, being both in *tort*, are compatible. If it were otherwise, it would not be material in this case,

as the evidence applied to the second count, and the instructions to the jury referred to it alone, and therefore the verdict might be amended by entering it on that count only. *West* v. *Ratlidge*, 4 Dev. 31.

PER CURIAM. Judgment affirmed.

WILLIAM RICHMOND vs. JOHN FUGUA.

After a debt had been barred by the statute of limitations, the debtor said to the creditor, "unless J. R. has paid it for me, it is a just debt and I will pay it;" and again, "it is a just debt and I will pay it, if I cannot prove that it has been settled by J. R." *Held*, that the case was thereby taken out of the statute. By such declarations, the *onus* of proof that the debt had been paid rested on the defendant.

Appeal from the Superior Court of Law of Caswell County, at the Fall Term 1850, his Honor Judge MANLY presiding.

The suit is assumpsit for money paid for the defendant, as his surety. It was commenced the 20th of November 1848. Plea, statute of limitations. On the trial the evidence was, that the plaintiff was the surety for the defendant to one Long, and that the plaintiff paid the debt in 1840, at which time the defendant resided in another State. In the year 1848, the defendant returned to this State, and, a short time before this suit was brought, the plaintiff requested payment from the defendant, and, in the conversation between them about this debt, the defendant said, unless John Richmond has paid it for me, it is a just debt

and I will pay it, and in another conversation on the same subject the defendant said to the plaintiff, "It is a just debt, and I will pay it, if I cannot prove, that it has been settled by John Richmond." John Richmond, who was referred to by the defendant, was present in Court at the trial, but was not called upon by either party. The point made was, whether there was such a promise or acknowledgment, on the part of the defendant, as revived the debt and entitled the plaintiff to recover. The Court held that there was, and after a verdict and judgment for the plaintiff the defendant appealed.

Kerr, for the plaintiff.
S. P. Hill, for the defendant.

Ruffin, C. J. The Court thinks the judgment should be affirmed. There is not only an acknowledgment of the original justice of the debt, and of its being just still, with the proviso only, that it had not been paid by a particular person named, but also an express promise then, to pay the debt, unless or if the defendant could not prove the payment had been made by that person. The defendant undertook in substance, to prove payment by an individual named, or, upon failure thereof, to pay the money. Upon the strength of that undertaking the *onus* was on the defendant, since he designated, with precision, the fact on which he relied for his discharge, and the person by whom he engaged to establish the fact affirmatively.

Per Curiam. Judgment affirmed.

JAMES TAYLOR *vs.* JOHN W. STEDMAN

Where a plaintiff in an action of assumpsit, in order to bar the operation of the statute of limitations, gives in evidence words used by the defendant, the language must be such as, without straining, imports a willingness and intention thereby to assume the debt, or amounts to an unequivocal acknowledgment of its subsistence and obligation.

In a conversation between the plaintiff and the defendant, in relation to the matter in dispute, the former said to the latter, "that matter about Frank's hire in 1842 must be fixed," when the latter asked, "will not other notes or judgments do instead of my note?" and the plaintiff remarking, "yes, if they are good," nothing further passed between them, *Held*, that the defendant's expressions did not revive the debt, and bar the operation of the statute.

The case of *Wolf* v *Fleming*, 1 Ire. 299, cited and approved.

Appeal from the Superior Court of Law of Chatham County, at the Fall Term 1850, his Honor Judge MANLY presiding.

This action is assumpsit for the hire of a slave, named Frank, for the year 1842. The suit was brought on the 25th of August 1848, and the defendant pleaded non assumpsit, and the statute of limitation. After establishing the hiring and the price, the plaintiff gave evidence of a conversation between him and the defendant in 1845, in which the plaintiff demanded the payment of this and other debts from the defendant, and the latter denied that he owed the plaintiff on any account, and insisted particularly that he had paid him for Frank's hire, and thereupon, the plantiff produced a note, given to him by the defendant on another account, on which there was a balance due, and contended that the hire of Frank had not

been paid. The plaintiff gave further evidence of another conversation between the parties in 1848, in which the plaintiff said, "that matter about Frank's hire for 1842, must be fixed," and the defendant, in return thereto, asked the plaintiff, "Will not other notes or judgments do, instead of my note," and the plaintiff replied, "yes, if they are good;" and nothing further passed between them.—The Court instructed the jury, that "the conversation between the parties in 1847 or 1848, wherein the defendant proposed to pay the debt in other notes or judgments, was an acknowledgement of a subsisting debt, which repelled the operation of the statute of limitations" The jury found for the plaintiff, and the defendant appealed from the judgment.

J. H. Haughton, for the plaintiff.
W. H. Haywood, for the defendant.

RUFFIN, C. J. The Court does not concur in the directions to the jury. The defendant is entitled to have his words fairly construed, so as to ascertain his real meaning, and the statute must stand as a bar, unless his language be such as, without straining, imports a willingness and intention thereby to assume the debt, or amounts to an unequivocal acknowledgement of its subsistence and obligation. Here it was supposed by his Honor, that the defendant proposed to pay the debt, and that the requisite acknowledgement was to be implied from the proposal. But, there was in truth no such proposal. The defendant, upon being pressed by the plaintiff to adjust the dispute about this demand, only enquired, whether the plaintiff would take notes on other people instead of his, which is very different from directly proposing payment in that manner, since his willingness to settle the controversy in that way might depend much on the value of the securities to be

transfered, and his liability on them. Hence where the plaintiff said, they must be good, the defendant proceeded no farther in making either an enquiry or proposal. If, however, there had been a distinct proposal to give the plaintiff particular notes or judgments, the requisite promise or acknowledgement could not be inferred therefrom, by itself, for that would convert an offer to pay in notes or a horse into a promise to pay in cash, though so very different, since an offer to pay in notes, like one to give a smaller sum than the alleged debt, is rather a proposal of compromise than assuming the debt anew, which brings the case within that of *Wolf* v. *Fleming*, 1 Ire. 290.

Per Curiam. Judgment reversed and *venire de novo*.

ROBERT CAFFEY AND WIFE vs. ROBERT C. RANKIN.

On a petition, under our Act of Assembly, for permission to emancipate a slave, the right of property in the slave cannot be determined. If a claim of right in the property, supported by affidavit or otherwise, is set up, in opposition to the right asserted by the petitioner, the Court should stay proceedings on the petition, until this matter can be determined between the parties, in an action at law or in equity.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term 1849, his Honor Judge Battle presiding.

This was a petition filed at the Spring Term 1848 of Guilford Superior Court, for permission to emancipate a negro boy, named Alvis, and other slaves named. The petition in substance sets forth, that sometime about the

year 1837, James Davis died, having first made and published his last will and testament, which was afterwards admitted to probate, and his widow, Sophia Davis, who was named therein sole executrix, duly qualified as such; that the said Sophia Davis died about the year 1843, having duly made and published her last will and testament, which was duly admitted to probate, but of which she appointed no executor; that the petitioner, Robert Caffey, has been duly appointed administrator with the will annexed of the said James Davis, and the other petitioner, Jane Caffey, administratrix with the will annexed of the said Sophia Davis. The petition further sets forth, that the said James Davis by his said will, among other things, bequeathed and directed as follows: "One negro girl named Nelly, and one mulatto named Nehemiah, I give them to my wife (said Sophia) during her natural life or widowhood, then to my son, Michael C. Davis, to him and his heirs forever, except Nelly and Nehemiah are to be free, if they can comply with the requisition of the law of this State; and if they cannot comply with the law to be free, and Michael C. Davis should die, without any heirs of his body, Nehemiah and Nelly may choose their own homes, where they like to live, and is to be sold privately at the valuation of two men:" That, between the making of the will of the said James Davis and his death, the slave Nelly had one child named Wright, which was sold by the said Sophia as executrix to one M. C. Davis, who afterwards sold and conveyed the same back to the said Sophia; and that, after the death of the said James Davis, the said Nelly had another son by the name of Alvis. The petition further sets forth, that Michael C. Davis, son of the testator James Davis, is dead, leaving an only child, the defendant James C. Davis, an infant, of whom Robert C. Rankin is guardian. The petition further sets forth, that the said Sophia Davis, by her last will, among other things, bequeathed and directed

as follows: "I give and bequeath to my grandson, James C. Davis, the only son of my son Michael Caffey Davis, deceased, one negro boy named Wright, and one negro boy named Alvis, on condition if Nehemiah and Nelly, their father and mother, comply with the laws of this State and go free, it is my will they should go with them, and not be kept back on account of their age, and if not, then these negroes, Wright and Alvis, must stay with their father and mother, and not be hired out: and if not, they must have the same chance of their father and mother in choosing homes, and be sold to the same person at the valuation of the same two men, that value their father and mother, according to my husband's, James Davis, will, and if James C Davis dies, not leaving no heirs of his own body, and these negroes cannot comply with the requisitions of the laws of this State and choose their homes and is valued, the money on conditions, if James C. Davis leaves no child of his own, if he does it is theirs, if not, it must go to the use of my step children. It is my will they never shall be parted from their parents." The petition further sets forth, that Nehemiah is about the age of forty-five, Nelly about forty, Wright about twelve, and Alvis about nine years of age, that the petitioners are desirous to emancipate all four of the said slaves, as requested in the said wills, but that Robert C. Rankin, as guardian of the infant, James C. Davis, objects thereto, so far as regards the boy Alvis. The petition further sets forth, that the said Sophia willed and bequeathed to the said James C. Davis, other property, greater in value than the said boy Alvis, and that the petitioners are advised, that the said James C. Davis cannot hold both with and against the will of the said Sophia, and that, if he takes the legacy given him in the said will, he cannot refuse to let the said boy Alvis be emancipated; and the petitioners aver, that they are ready and willing to give the bonds and security required by law, to emancipate all of the said slaves.

The petitioners then pray, that advertisement may be made, according to law, that James C. Davis, by his guardian Robert C. Rankin, be made a party defendant, and that the Court will grant them permission to emancipate the said slaves, according to law, and will make such other orders, decrees, and grant such further relief as the nature of their case may require, &c.

Whereupon advertisements were ordered and made, and a subpœna issued and executed, according to the prayer of the petition.

At the Fall Term 1818 of the said Court, Robert C. Rankin, as guardian of the said James C. Davis, by leave of the Court, filed an answer, in behalf of his ward, in substance and to the effect following: That he admits the execution and probate of the respective wills of James and Sophia Davis, and that the petitioners are the administrators with the wills annexed of the said testators, respectively—the death of M. C. Davis, leaving an only child, the defendant James C. Davis, of whom the defendant, Robert, is the guardian—the birth of the negro children Wright and Alvis, at the times stated—and the purchase of Wright by Michael C. Davis, all as set forth in the petition. But he denies that Michael was re-sold to Sophia Davis and prays strict proof thereof. He submits that this proceeding is in a Court of Law, and that a Court of Law has no power to compel an election—that even a Court of Equity would not do so in a case like the present, for the reasons he assigns. He avers that he objects to the emancipation of all the slaves named, and prays to be dismissed, &c.

Replication was taken and commissions issued.

At Spring Term 1850, the following decree was made by the Court:

This case coming on to be heard, upon the petition, answer and agreement of the parties, which is in the following words, to wit: "In this case it is agreed, that adver-

tisement hath been made according to law—that James Davis made his will at the time it bears date—that Sophia Davis died the 9th of January, 1848, and made her will at the time it bears date—that James Davis died in April 1827—that the slaves, Nehemiah and Nelly, are husband and wife, and were so at the date James Davis made his will—that the slave Nelly had one child, to-wit, Wright, between the making of the will of James Davis and his death, which said slave, Wright, the said Sophia, as executrix of her husband, James Davis, sold at public auction to Michael C. Davis for $150, then an infant some 12 months old, and duly executed a bill of sale to the said Michael—that the said Michael afterwards sold to the said Sophia Davis the said slave, Wright, for $150—that he conveyed him by bill of sale, and the said Sophia held the said Wright, as her own property, until her death—and that, after the death of James Davis, the negro woman Nelly had the other child Alvis:" It is considered, ordered, adjudged and decreed by the Court, that the petitioners may emancipate the slaves mentioned in the petition, to-wit, Nehemiah, Nelly and Wright, and that they have leave to emancipate the said three slaves, when they shall enter into bonds, with two sureties, each good and sufficient, payable to the State of North Carolina in the sum of one thousand dollars for each of the said slaves, Nehemiah, Nelly and Wright, conditioned that the said slave or slaves shall honestly and correctly demean themselves, while they shall remain within the State of North Carolina, and that they and each of them will, within ninety days after the granting of the prayer of the petition, leave the State of North Carolina, and never afterwards come within the same.

And the Court, being of opinion on the whole case and on the proper construction of the two wills, made also a part of the case, that the petitioners or either of them did not have the right and power to emancipate the negro

slave child, Alvis, born after the death of the testator, James Davis, on the ground stated in the petition or any other, considered and adjudged, that the prayer of the petitioners to emancipate the said slave, Alvis, be refused.

From this judgment the petitioners prayed for and obtained an appeal to the Supreme Court.

H. W. *Miller*, for the plaintiffs.
Morehead, for the defendant.

Pearson, J. We do not concur in the view taken in the Court below, of the proceedings under the 59th Sec. of Ch. 111 of the Rev. Stat. in regard to the emancipation of slaves. In that Court it was assumed, that the right of property and the authority of the executor might be contested and their rights adjudicated, and consequently that there was an appeal to this Court.

On the contrary we think the proceeding is *ex parte* under the 57th, Sec. The title of the petitioner is presumed to be unquestioned. Under the 59 Sec. the authority of the executor is taken for granted, the Court gives no *judgment*, but merely grants permission, to emancipate, upon being satisfied that due advertisement has been made, and the bonds required executed. This permission to emancipate does not bind the rights of third persons. There is no "adversary suit," and consequently no right of appeal. The proceeding does not fall under the first Sec. or within either the cases enumerated is the 2nd Sec. of the 4th Ch,, of the Rev. Stat. But it is asked, why require advertisement if there is no right of contestation? The answer is, because the interest of the real owner may be prejudiced by having his slave under this *ex parte* proceeding apparently converted into a free person, and sent out of the state, and the petitioner may not be able to answer in damages for the money.

If the petition be under the 57 Sec. and the right of property is disputed, upon this suggestion, supported by proper affidavit, the Court ought to suspend the proceedings, until the right can be settled in the proper action at law. If the proceeding be under the 59th Sec. and the authority of the executor is disputed, upon this suggestion properly supported, the Court ought to suspend the proceeding until the power of the executor can be settled by a declaration of the rights of the parties in a Court of Equity: In analogy to the proceeding under a petition for partition, when, if the party sets up claim in severalty, an action at law must be brought.

In this case, for instance, it is suggested, that, as the woman Nelly was given to Sophia Davis, for life, remainder to Richard Davis, the boy Alvis, after the testator's death, belongs to the personal representatives of Richard Davis, and Sophia Davis, could not by her will give any authority to emancipate. The right of property, therefore, as well as the authority is disputed, and these questions cannot be settled in an *ex parte* proceeding. At all events they cannot be conclusively settled, so as to bind the representatives of Richard Davis. So it may be suggested, that as James C. Davis takes other property under the will of Sophia Davis, he ought to be put to his election. These are interesting questions, which can only be decided in Equity. It manifestly was not the intention of the statute, that such questions should be settled under a petition for permission to emancipate slaves.

Per Curiam. Appeal dismissed.

DEN ON DEMISE OF WILLIAM BADHAM & AL vs. JOHN COX.

When a vendor of land retains the title, as a security for the purchase money, and a balance remains due, the vendee has not such an interest as is liable to execution under the Act, Rev. Stat. ch. 45, sec. 4, so as to divest the legal title of the vendor.

Under a *venditioni exponas* against land, the sheriff can sell only that, which he could have sold under the *fi. fa.* on which the *venditioni exponas* issued, while such *fi. fa.* remained in his hands unreturned.

If the defendant in an execution has no interest in land, which is subject to be levied on, while the *fieri facias* remains in the hands of the sheriff, unreturned, but, after the return, he acquires a title, which is subject to execution, this subsequently acquired title cannot be sold under a *venditioni exponas* issuing upon such *fieri facias*.

Such subsequently acquired title shall not operate as an estoppel, in favo of a purchaser at a sale, made under such *venditioni exponas*. The law only sells *estates* under its process, and not the *chances of an estoppel*.

The cases of *Flynn* v *Williams*, 1 Ire 509, *Gentry* v *Wagstaff*, 13 Dev 270, *Tarkinton* v *Alexander*, 2 Dev & Bat 87, and *Smith* v *Spencer*, 3 Ire 265, cited and approved.

Appeal from the Superior Court of Law of Chowan County, at a Special Term in December 1850, his Honor Judge BATTLE presiding.

This was an action of Ejectment.

Upon the trial the case appeared to be as follows.—The defendant, Cox, was seised in fee of the premises, being a wharf and store in the town of Edenton, and, on the 1st of January 1843, contracted for the sale of them to one George Gordon, in fee, for the price of $2500, payable as follows: $1800 on the 1st of May 1848, and $700 on the 1st of January 1849; and a conveyance was to be made when the purchase money with the interest thereon

should be fully paid, but, in the mean while, Gordon was to be let into possession. Articles were entered into accordingly, and Gordon took possession and paid the first instalment, but no part of the second. In March 1849 judgments were obtained before justices of the peace by several of Gordon's creditors, and executions were issued thereon, and levied on the premises and returned to the County Court, and in August following, orders of sale were made, and then writs *venditioni exponas* were sued out, under which the Sheriff sold the premises to the lessors of the plaintiff, on the 10th of November 1849, and made them a deed. On the 6th of May 1849, Gordon made to Samuel T. Bond an assignment of all his interest "in the premises, in trust to sell the same and out of the proceeds pay a debt from him to Haynes and Goodrige; thereafter Gordon continued in possession until the 8th of Oct. 1849, on which day Bond, in conformity with the assignment to him, made a contract for the sale of a part of the premises to the defendant, and Gordon went out, and he and Bond let the defendant into possession of that part of the premises which he, Cox, purchased back, and which is in dispute in this action. On the 6th day of November 1849, Cox executed to Gordon a deed in the following terms:

"Know all men by these presents that I, John Cox, of &c., agreeable to a memorandum of agreement entered into with George Gordon of &c., on the 1st of January 1848 to make title to a certain portion of wharf property known as &c, on the payment of &c.. Now therefore in consideration of the sum of $2650 being paid before the delivering of these presents, and to enable Haynes and Goodridge to make sale and pay me, as also to convey to me, the said Cox, such portions of said property as I may purchase at said trustees sale, as also agreed to by the said George Gordon, I hereby convey the following property in fee simple to him the said George, and his heirs and assigns forever.

that is to say, the wharf &. Which said property hereby conveyed I do warrant, &c., to the said George Gordon, and his heirs, against the lawful claim of all persons."— On the same day Bond and Gordon executed to Cox a deed for the part of the premises claimed by the defendant in this suit, purporting to convey the same in fee.— Thereupon the counsel for the plaintiff insisted, that Gordon had, under the original contract between him and the defendant, such an interest as might be levied on under the *fieri facias*, and be sold under the *venditioni exponas*, or that, by the deed from the defendant of the 5th of November 1849, Gordon acquired such an interest as was liable to be sold under the *venditioni exponas* and passed by the sheriff's sale of the 10th of November 1849, and his deed to the lessors of the plaintiff; and that the defendant was estopped to deny their title. But the Court held, that the plaintiff could not recover, and, after a verdict and judgment against him, he appealed.

A. Moore and Heath, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. No title passed by the sheriff's sale.— When the vendor retains the title, as a security for the purchase money, and a balance remains due, the vendee has not such a trust as is made liable to execution by the 1st section of the act of 1812, so as to divest the legal title of the vendor. That was settled as soon as the act passed. Consequently the constable's levy was ineffectual, at the time it was made and returned. It follows, likewise, that the sale under the *venditioni exponas* was equally inoperative, notwithstanding the debtor may have acquired the legal title, while the sheriff had the latter writ in his hands. The case may be considered, as if the *fieri facias* had been issued from a Court of record and directed to the sheriff. The debtor's interest in the premises could

not have been sold or taken under it, at any time before its return, inasmuch as it was not subject to execution; and, if there had been a sale under the *fieri facias*, the subsequently acquired legal estate would have been unaffected by it, because the law only sells estates under its process, and not the chances of an estoppel. *Flynn* v. *Williams*, 1 Ire. 509 *Gentry* v. *Wagstaff*, 3 Dev. 270. It must be the same with the sale under the *venditioni exponas*, since that was founded upon the levy, which was made and returned, when the debtor had no estate. That results from the effects of a *fieri facias* on land and from the peculiarity of the *venditioni exponas*. The levy of the *fieri facias* does not vest either the title or the possession of land in the sheriff, but merely confers on him the power to sell the debtor's estate or interest, such as it is, while he has the writ in his hands before the return day. *Barden* v. *McKinnie*, 4 Hawks 279. If a title accrue to the debtor after the levy, but while the *fi. fa.* is in force, no doubt it may be sold, and will pass by the sale of the land, simply, without special reference to the new title; for it is within the mandate of the writ under which the sale is made. That may be true, also, when a sale was not made on the *fi. fa.*, but on a *venditioni exponas*, but a title accrued to the debtor between the levy and the return of the *fi. fa.* But it seems clear, that the *venditioni exponas* does not attach to an estate, acquired by the debtor after the return of the *fieri facias*. In respect to chattels, that writ confers no authority to take or even to sell them, but is merely to compel the sale of property before vested in the sheriff and in his possession, which he might sell without the writ. It is, indeed, otherwise in respect to realty. There the office of the writ is to confer an authority on the sheriff, as well as to compel him to sell.—But it is not an authority to take anything. It is merely to sell the land, and that only, which the levy of the *fieri facias* placed in *custodia legis*, and appropriated to the

satisfaction of the debt, and which is identified in the writ. The *venditioni exponas*, therefore, relates to the *fieri facias*, and is a warrant to the sheriff to do then, what he might have done under the *fieri facias*, while it was in force; and it can have no other effect. *Tarkinton* v. *Alexander*, 2 Dev. & Bat. 67. *Smith* v. *Spencer*, 3 Ire. 265. The levy of the *fieri facias* created a specific lien on the estate of the debtor as it was at the teste of the writ and at any time between the teste and the return, which could not be enforced by virtue of the *fieri facias*, itself, as it might be as to personals, but required a *venditioni exponas* for that purpose. Still the latter writ gave no more power to sell than the sheriff once had under the *fieri facias*, if he had exercised it, when he had the *fieri facias*; because its object is only to have a sale of what was lawfully taken on the *fieri facias*, and nothing more. An estate in this land, which accrued after the *venditioni exponas* sued, is therefore no more subject to it than any other tract of land, purchased out and out in the interim, would be; for, in a legal sense, the one was no more levied on than the other. It is unnecessary, therefore, to enquire into the operation of the deeds between the defendant and Gordon, and Bond; for supposing Gordon to have gained a title thereby, which was liable to execution, it was not liable to the particular execution, under which it was sold. For that reason the judgment must be affirmed.

Per Curiam. Judgment affirmed.

DOE ON DEMISE OF HENRY BULLARD vs. GEORGE T. BARKSDALE.

It is established, as a general proposition, that from a long and peaceable possession of land, upon a claim of the right, a presumption arises, that the possession was rightful, and therefore was under such grant, deeds and assurances, as are necessary to impart to it that character.

The presumption is not deduced as an inference of fact from the possession, as evidence merely and according to its influence on the minds of the jury, in producing, or failing to produce, a conviction, that the presumption is according to the truth, but the deduction is made, without regard to the very fact, by a rule in the law of evidence.

The force of this presumption is not destroyed or in any degree repelled by evidence, which renders it probable, that, in truth, a grant was not issued.

The grant is presumed, not because the jury believed that one issued, but because there is no proof, that it did not issue; indeed, in the nature of things, it would seem, that there can be no sufficient negative proof of the kind supposed.

Where a long possession, under a claim of title by a grant, as in this case of forty-seven years, has been proved, and to rebut the presumption it was shewn that the party so claiming was unable to produce a grant, declared his belief that it never existed, and made efforts to obtain another grant; the Court ought not to have submitted to the jury, upon this evidence, to find whether there was a grant or not, but should have instructed them, that, from the possession alleged, they should presume a grant, and, as matter of law, that there was no evidence to oppose and repel the presumption.

The cases of *Reed* v *Earnhart*, 10 Ire. 516, and *Hurly* v *Morgan*, 1 Dev. & Bat. 425, cited and approved.

Appeal from the Superior Court of Law of Sampson County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

This was an action of Ejectment.

The premises are situate in Sampson County and contain 440 acres, and were granted to the lessor of the plaintiff in 1845, who instituted this suit in May 1846: the defendant gave evidence at the trial, that, in 1847, he purchased the premises from a person then in possession, and immediately entered and had been in actual possession of them ever since, and that his vendor and those, under whom he claimed, had been in the actual continued possession of the premises from the year 1777 to 1847, claiming them as their own, under known and visible boundaries. On the part of the plaintiff, evidence was then given, that, in 1844, the defendant said he could not find a grant for the land, and that one Black, a surveyor, had said to him, that some one might trouble him, and advised him to enter it and get a grant; that the defendant accordingly made an entry (after that of the lessor of the plaintiff) and took out a warrant and had his survey made and sent it to Raleigh by a messenger in haste, for the purpose of being before the lessor of the plaintiff in getting a grant, if he could.

The counsel for the defendant insisted that, by reason of the long continued, and peaceable possession of the premises by the defendant, and those under whom he came in, claiming them as their own, a presumption of a grant from the State, prior to that made to the lessor of the plaintiff, arose, and that, for that reason, the plaintiff could not recover. The Court declined giving the instruction in that form, but directed the jury, that, if they believed the defendant, and those under whom he claimed, had been in possession of the land under known and visible boundaries for the period alleged by him, they were bound to presume that the defendant, or one of those under whom he claimed, had a grant for it, unless they were satisfied from other evidence offered, that, in fact, no such grant existed.

The counsel for the defendant further moved the Court to instruct the jury, that, if they found such a possession, on which a grant was to be presumed by them according to the foregoing instruction, there was no other evidence offered in this case, which could rebut that presumption, and that the defendant was entitled to a verdict. But the Court refused to give this instruction, and directed the jury that the declarations and acts of the defendant, respecting a grant, were evidence tending to rebut the presumption, which was proper to be considered by the jury, and the Court would not intimate an opinion, whether it was sufficient for that purpose, but that the jury were the judges of its weight, and were to consider, whether those declarations and acts were the result of knowledge or of ignorance and mistake in the defendant, as one might by mistake admit that he had no title, when he had a good one. There was a verdict for the plaintiff, on which judgment was entered, and the defendant appealed.

D. Reid, with whom was *Dobbin*, for the plaintiff, submitted the following argument:

Presumption of legal title, by grant or otherwise, founded on great length of possession, is not conclusive; in other words it is not an inference of law, to be made by the Courts, yet it is an inference which the Courts advise juries to make, whenever the presumption stands unrebutted by contrary evidence.

There are two kinds of presumptions, the one a conclusive presumption of law, which cannot be contradicted; the other a species of evidence. 1 *Starkie on Ev.* 78.—For instance, the law raises a *conclusive* presumption of title on an adverse possession of twenty-one years under color of title, but long adverse possession without color of title is only *evidence* from which a title may be inferred.

In *Fitzrandolph* v. *Norman*, N. C. Term Rep. 131, Chief Justice TAYLOR says, "There is a distinction made by the law, between length of time operating as a positive bar, and that which is only used by way of evidence. The first is conclusive upon Courts and juries, but when length of time is relied upon as evidence, the jury will believe it or not, according to the attending circumstances." In the same case, SEAWELL Judge, says, "a possession was a *circumstance* and nothing more, from which the law warranted the jury in presuming a grant." This is the leading case in this State, and has been frequently cited by this Court with approbation. *Candler* v. *Lunsford*, 4 Dev. & Bat. 407. *Wallace* v. *Maxwell*, 7 Ire. 135. *Reed* v. *Earnhart*, 10 Ire. 516. *Rodgers* v. *Mabe*, 4 Dev. 180. In this latter case, RUFFIN, Chief Justice, observes, "The jury should have been told, (here the possession was upwards of forty years) that they ought to presume it, (grant) unless from the other evidence, they were satisfied a grant did not issue. In this State, time does not as yet constitute title, unless it be of that particular kind created by statutes limiting actions on rights; in all other cases it is evidence."

The English authorities are to this extent: grants from the Crown, *may*, after great length of possession, be presumed. 3 *Starkie Ev.* 915. *Saund.* 728. 1 *Cowp.* 110. *Camp.* 102.

The rule laid down in the case of *Maxwell* v. *Wallace*, 10 Ire. 110, and relied on by the counsel for the appellant, as applied to the facts of that case, is correct, but it would be extending the rule too far, to say, that in every case of long adverse possession, the law presumed a grant and the jury *ought* so to find. Lord ELDON has intimated, that the doctrine of legal presumption ought not to be extended. 6 *Ves.* 194. (*Evans* v. *Bicknell.*)

It is next to be inquired whether there was in this case any evidence to rebut the presumption of a grant.

The rule was adopted by the Courts from principles of public policy and convenience, founded upon the supposition, that every possession is upon a claim of right, and the inadequacy of human tribunals to investigate the truth of remote transactions, and the loss and destruction of title deeds from lapse of time. Then the acknowledgment and acts of the person in possession, to whom the law presumes that the grant did issue, to the effect that he had no grant, is certainly *some* evidence, tending to rebut the presumption that the grant did issue, and had been lost or destroyed in the course of nature. Whether the evidence was sufficient in the minds of the jury to repel the presumption, was for them to consider, and is not a ground for *venire de novo*.

Strange and W. Winslow, for the defendant.

RUFFIN, C. J. There have been so many adjudications upon titles set up under the presumption of conveyances, from ancient and continued possession, after full discussions, that one is under no necessity of going back to the nature and grounds of the presumption, in order to consider them in detail. It is sufficient to say, that it is established, as a general proposition, that, from a long and peaceable possession, upon a claim of the right, a presumption arises that the possession was rightful, and, therefore, was under such deeds and assurances as are necessary to impart to it that character. The presumption is not deduced, as an inference of fact, from the possession, as evidence merely and according to its influence on the minds of the jury, in producing or failing to produce, a conviction, that the presumption is according to the truth; but the deduction is made, without regard to the very fact, by a rule in the law of evidence. It is a rule of reason and of policy, calculated to make men diligent and active in asserting their rights before proofs,

once existing, may be lost, and while there is no insuperable difficulty in ascertaining the real truth. If, indeed, one enter for a particular estate or under a particular title, and the nature of the original entry be shewn, then the presumption, that the possession, though very long, was upon a claim of the possession to the estate, does not arise as a legal inference; and it can enure to transfer the estate, only when the possession is so very long and upon a claim of right, as, with other circumstances, to induce the actual belief, that subsequent to the possession taken, there were other dealings, upon which conveyances were in fact made That, however, concerns mainly transactions between individuals touching estates already vested in one of them; for, considering the state of our law respecting the public domain, its management and disposition to private citizens, it is seldom, if ever, to be supposed, that possession is taken of any part of it for any particular estate or purpose, which can give a character to a long possession, by which it may be disconnected from the purpose in the possessor of obtaining the absolute title from the State, or from the apparent exercise of the rights of one who is already the owner of the land by having a grant for it. The only question in such cases is, whether the possession has been long enough to justify an implication against the sovereign from the *laches* of the public servants, and the omission of private persons to appropriate the land. But it is manifest, from the necessity, which gives rise to the presumption, and from its nature, that it is not supposed to establish as a fact, that a grant was issued; and that its force is not destroyed, or in any degree repelled by evidence, which renders it probable, that in truth a grant was not issued. If that were the sort of presumption the law raises, or if it could in that way be repelled, it would poorly serve its purpose, and be, really, worth nothing. For, as to the actual probability upon the point, the facts, that the grant is not produced,

that it does not appear upon the registry in the County, and that no counterpart is enrolled in the department of State, and that no survey or entry is exhibited, nor credit for the payment of the purchase money at the treasury, would, in every case, constitute a mass of evidence, which could not fail to overturn the artificial presumption we are considering, and is in itself much stronger in its tendency to repel the presumption, than the acts and declarations of the defendant, which were offered in this case. But, as first remarked, it is hardly pretended in any case, that a grant was actually made out; for, it was truly stated by Lord MANSFIELD, in *Eldridge* v. *Knott*, Cowp. 215, that the Court often told the jury to presume a grant from long possession, when there was no idea that the jury believed, or the Court thought they ought to believe, in the particular case, that a grant had been made, and when it was not probable it had; the fact being presumed upon a principle of quieting possessions. These probabilities to the contrary, therefore, do not at all answer the presumption. The same position is very distinctly laid down in *Reed* v. *Earnhart*, 10 Ire 516; and in that all the Judges concurred. It is there said, that the grant is presumed, not because the jury believe that one issued, but because there is no proof, that it did not issue. Indeed, in the nature of the thing, it would seem, that there can be no sufficient negative proof of the kind supposed; for, whatever probabilities may be shewn, that there was no grant in fact; yet the probability of its existence remains, which is sufficient to serve the presumption created by long possession under a claim of title by a grant. Such a possession was admitted to exist here —being for 47 years. That constitutes a title under a presumed grant. The existence of the grant, thus presumed, is not disproved by the inability of the party to produce it, or even by his declaration of a belief that it never existed—much less by his efforts to obtain another

grant, since he might wish it, as the most direct and permanent evidence of title. Indeed, the obtaining of a new grant does not disprove the existence of a former one, nor even render it highly improbable, where there has been a long possession, as under an old grant; for, there is nothing inconsistent in a person's making sure his title by further conveyances, and especially in getting a patent, which proves itself, instead of relying on witnesses to establish an ancient possession, under a claim of right, as a foundation for presuming a grant. A second grant could only shew the party's caution and vigilance, evinced in making out a title under two distinct grants—the one presumed to have existed, and the other shewn to be existing. *Hurly* v. *Morgan*, 1 Dev. & Bat 425. The Court therefore holds it to have been erroneous to submit this question to the jury on this evidence, as one of fact to be found by them, according to the weight they might give to the circumstances, as evidence to their minds. The instruction ought to have been, that, from the possession alleged, they should presume a grant, and, as matter of law, that there was no evidence to oppose or repel the presumption.

Per Curiam. Judgment reversed and *venire de novo*.

THOMAS E. POWELL, ADM'R, &c. *vs.* JOHN FELTON & AL.

When a man claims title under color of title and seven years' possession, it is not evidence of the adverse possession, that he had put the wife of one who claims to be the owner of the land, in possession. When a husband is in possession, he is not deprived of it by any arrangement between his wife and a third person, pretending to own the land and to put her in possession.

The provisions of the Act of 1846, ch. 1, (Pamphlet Laws) do not apply to a case, where an administrator of the deceased was appointed before the 1st of February 1847, though that administator be dead, and an administration *de bonis non* be granted, subsequently to that date, when the Act was to go into operation.

Appeal from the Superior Court of Law of Gates County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

This is a petition filed in August 1847, by the administrator *de bonis non* of Elisha F. Hare, to sell a tract of land under the Act of 1846, ch. 1, which makes real estate personal in certain cases. The intestate died in 1846, and administration was granted in that year, to a person who died in 1847, and in August 1847, the letters were granted to the petitioner. The intestate had no child, but left his father and brothers, and sisters, who were his heirs at law and are defendants. The petition states, that the intestate died indebted to several persons in particular sums mentioned, and that he left no personal assets, but died seised in fee of the tract of land described in the petition, and that it was necessary to sell the same for the payment of those debts, and prays that

such sale be made. The heirs at law made no resistance. But one John Felton claimed the premises, under an alleged sale and conveyance made to him by one Norfleet, and applied to the County Court to have an issue made up to try the title, which was allowed. On his motion the petition was then dismissed by the County Court, but without any cause assigned in the record; and an appeal was taken by the petitioner. In the Superior Court the counsel of Felton objected, that the petition could not be sustained, because administration on the intestate's estate had been first granted in 1846, and therefore the case was not within the act. But the Court held that it was within the spirit and equity of the act, and denied the motion; and a jury was then empanneled on the issue. On the trial evidence was given, that in 1824 Thomas Hare conveyed the premises in fee to the intestate, then an infant of tender years, and delivered the deed and the possession of the premises to Jesse L. Hare, the father of the intestate, to be held for his said son; and that the said Jesse L. and the intestate lived together on the premises, until the death of the latter in 1846. Felton then gave in evidence a deed for the premises, made to him by Norfleet in 1833, reciting that Norfleet had purchased the land at sheriff's sale for taxes, as the property of the intestate: And he gave further evidence that in the year 1833, he, Felton, put the wife of the said Jesse L. in possession of the premises, to hold the same during her life, and that thereafter, the said Jesse L., his wife, the intestate, and their other children, continued to live there as one family, as they had done before, until the death of the intestate, and up to the present time. And evidence was further given on the part of said Felton, that the intestate, about a year before his death, said the land belonged to said Felton.

The counsel for Felton prayed the Court to instruct the jury thereon, that the possession of the premises by his

tenant, the wife of Jesse L. Hare, from the year 1835, to the death of the intestate, under the color of title constituted by the deed from Norfleet, vested the title in him. But the Court refused to give that instruction, and directed the jury, that, if Jesse L. Hare took possession and held for his said son, his possession did not become opposed to his son by reason that Felton professed, as stated, to put the wife of the tenant into possession. The jury found that Felton was not entitled to the premises, and the intestate, Elisha L. Hare, was seised of the same in fee at the time of his death. After judgment against Felton for costs, he appealed.

A. Moore, for the plaintiff.
Heath, for the defendants.

Ruffin, C. J. Besides the points made at the trial, there are others arising on the facts stated in the record, which would be worthy of consideration, if needful to the decision of the pending appeal. One, for instance, is, whether, notwithstanding the broad terms of the 13th section of the act of 1846, "when the land shall be claimed by another under any pretence whatsoever," a stranger, who sets up a title adverse to the deceased, is within the act, so as to enable the administrator to make him a party to the petition, in order to determine the property; or whether those terms are not rather to be construed in reference to the 4th, 11th, and 12th sections, and thus confined to persons "interested in the said estate" of the deceased, either as heir, devisee, mortgagee, fraudulent donee, or other person claiming under the deceased.—Then, supposing that an adverse claim may be litigated in this form of proceeding, another question is, whether it must not be at the instance of the administrator, and the claim be set forth in the petition, or whether, as here, the adverse claimant may, of himself, intervene and demand

an issue upon his title. These points, however, may be passed over, since, supposing them for the appellant, the Court hold the opinion to be correct, that he has not the title to the premises, and therefore, that he has no right to a reversal of any judgment, that might have been rendered on the petition. He did not set up the deed to himself, as vesting the title in him, but only as color of title. Consequently it remained for him to show seven years possession, under it, adverse to the real owner; and in that he failed entirely. For, it cannot be in the least doubted, that when a husband is in possession, he is not deprived of it by any arrangement between his wife and a third person, pretending to own the land and to put her in possession. So, when the husband is in under one person, the character of his possession cannot be changed by such an arrangement and pretence, the husband not being, in fact, disturbed, but continuing to enjoy as before. If the wife could be regarded at all as Felton's tenant, yet she had no distinct possession of her own, as the husband and son were all the time on the land, and the possession would be adjudged to be with the title. Judgment was therefore properly rendered against the appellant for the costs accrued on the issue tendered by him.

As the appellant is thus put out of the case, it is not material between those parties, whether the Court was right or wrong in holding this to be a proper case for the sale under the act of 1846, notwithstanding administration was first granted on the intestate's estate in 1816; for, if wrong, then in the first place, it was the appellant's folly to intervene in a matter, in which no order could be made to his prejudice, and, in the next, having no title to the property, he has no interest in the question. But, as the appeal was from an interlocutory judgment on a collateral question, there can be no final judgment here, but the cause must be remanded for further proceedings between the other parties; and, as the question is raised in the

record, it seems proper the Court should give an opinion on it, in aid of the parties, upon these or other proceedings to subject the land for the intestate's debts. Upon this question, the opinion of the Court differs from that of his Honor. Both in the 4th and in the 18th sections, it is expressly provided, that the mode of proceeding prescribed in the act, shall only be in use, when the will may have been proven or letters of administration granted on or after February 1st, 1847. When there is a will there can be no mistake as to the construction; for, without any regard to the date of the will or the period of the testator's death, or the qualification of the executor or administrator *cum testamento annexo*, the jurisdiction is determined by the period of the probate of the will, and by that alone, according to the tenor of the act. It seems plain, that the provision intended to designate explicitly some certain event, and period, for the important changes introduced, not only as to the mode of proceeding to subject real estate, but as to the application thereof or the proceeds to the debts, so that the creditors and representatives of deceased debtors might know exactly their rights and duties at the different periods, before and after that day. An administrator, with the will annexed, is thus plainly excluded, when the will was proved before February 1847, though his letters were granted afterwards. As the reason for that provision arises out of the rights of the creditors to preferences, it follows, when the original administration was before February 1947, that the administrator *de bonis non*, subsequently appointed, stands on the same ground with the administrator with the will annexed, above supposed. But that is put beyond all question by the additional enactment in the close of the 18th sec. that "the present mode of proceeding against real estate shall be in use, in all cases when the will may have been proven or letters of administration granted prior to that day," that is, prior to the 1st of Feb. 1847. Upon the grant

of the first administation, the rights of the creditors, as between themselves, were determined by the law then in force, as were also the means of obtaining satisfaction by the various legal and equitable remedies, according to the nature of the securities and of the assets, as legal or equitable; and the provisions under consideration were intended as a plain declaration, that neither those rights nor remedies were to be interfered with in any existing case or any one that might arise thereafter, provided there had been, or should be, a probate of the deceased debtor's will, if he left one, or an administrator on his estate, if intestate, before the first of February following, by which time it might be expected the new law would be generally known. Whatever obscurity may rest on other parts of the Act or difficulties arise out of its provisions, those upon this point seem sufficiently plain, and show that the present case is not embraced in the act, and that it was erroneous to entertain the petition.

The decision of the Court, however, is, that there is no error in the judgment against John Felton, from which he appealed. That will be certified to the Superior Court, with directions to proceed, as between the other parties, according to right and justice.

Per Curiam. Ordered to be certified accordingly.

THE STATE vs. DARLING CHERRY.

Whether, when a man presents a pistol at another, threatening to shoot, and the pistol is not loaded, he is guilty of an assault, may admit of some question, but the man charged, clearly, cannot be excused, unless he proves that it was not loaded. The State is not bound to prove that it was loaded.

Appeal from the Superior Court of Law of Martin County, at the Fall Term 1849, his Honor Judge BAILEY presiding.

This was an indictment in the usual form for an assault and battery. Upon the trial it was proved, that the prosecutor was a constable and had in his hands an execution against the defendant, under which he seised a negro belonging to the defendant. Whereupon, the defendant, standing within a few feet of the prosecutor, and within carrying distance of the pistol, presented the same at the prosecutor, remarking to him, "If you do not turn the negro loose I will shoot you," by which the prosecutor was put in fear. The prosecutor did not turn the negro loose, and the defendant immediately lowered the pistol and went away.

The defendant's counsel contended, that, as it did not appear that the pistol was loaded, the defendant was not guilty. The Court charged the jury, that, if they believed the facts deposed to were true, the defendant was guilty in law of an assault.

The jury found the defendant guilty of an assault, and from the judgment on the verdict the defendant appealed.

Attorney General, for the State.
Biggs, for the defendant.

Pearson, J. When a man presents a pistol at another, threatening to shoot, he puts him in fear, and gives him a legal excuse for a battery, and it may be questioned whether the act can be excused, by proving that the pistol was not loaded; without also proving that the other person knew that fact. In this case there was no proof that the pistol was not loaded, and the question is, was the State bound to prove that it was loaded. We entirely concur with the Judge in the Court below. The fact, that it was not loaded, is a matter of excuse, and must be proved by the defendant. The fact was within his knowledge, and as by his act, (actions, it is said, speak louder than words,) he represented the pistol to be loaded, he has no right to complain, that such is *prima facie* taken to be the fact, unless he proves to the contrary.

Per Curiam. Judgment affirmed.

THE STATE *vs.* ANTHONY BURROWS.

The provisions of the Act of 1811, ch. 814. Rev. Code, Revised Statutes, ch. 34, sec. 61, punishing the cheating by false tokens, &c, do not apply to the case of conveyances of lands.

Where the charge intended to be made in such an indictment is, that the defendant intended to cheat the plaintiff out of twenty acres of land, the excess in quantity over thirty-five acres, the indictment should expressly aver that there was, in fact, such an excess of twenty acres.

Where the true ground of complaint was, that the defendant, by means of a forged paper, induced the prosecutor to execute a deed for 35½ acres of land instead of 55 1-2 acres, thereby defrauding the prosecutor, the indictment should distinctly aver this fraudulent purpose; but, though this be a fraud, it does not come within the definition of any crime or misdemeanor, known either to the common or statute law.

Appeal from the Superior Court of Law of Martin County, at the Fall Term 1850, his Honor Judge BAILEY presiding.

The defendant was tried upon the following indictment:

STATE OF NORTH CAROLINA, Martin County, } *Superior Court of Law*, Fall Term 1849.

The jurors for the State upon their oath present, that Anthony Burrows, late of the County of Martin, on the first day of May, in the year of our Lord one thousand eight hundred and forty nine, with force and arms, at and in the County of Martin aforesaid, unlawfully, knowingly and designedly, a certain forged paper in writing as a true paper in the proper hand-writing of one Thomas R. Cofield, falsely, fraudulently and deceitfully did exhibit to one Eli Cherry (the said Eli Cherry having thereto-

fore agreed to sell to the said Anthony Burrows a tract of land, situate in the County of Martin at the price of one dollar an acre, and both the said Eli Cherry and Anthony Burrows having requested the said Thomas R. Cofield to survey the said tract, in order to ascertain the number of acres contained, and the said Thomas R. Cofield having surveyed the same and made a plat, as requested, and delivered the same to the said Anthony Burrows, to be exhibited to the said Eli Cherry, before the execution of a deed, whereby the said tract of land was to be conveyed from the said Eli Cherry to the said Anthony Burrows,) in and by which false and forged writing it was made to appear by the writing thereof that the said tract of land had been surveyed by the said Thomas R. Cofield, and contained only thirty-five and one half acres of land, by reason of which said forged paper the said Anthony Burrows, on the day aforesaid at and in the County aforesaid, unlawfully, knowingly and designedly, falsely, fraudulently and deceitfully did obtain a deed of conveyance from the said Eli Cherry for the tract of land aforesaid, wherein and whereby the said tract of land was described as containing thirty five and one half acres of land at the price of thirty-five dollars and fifty cents, and, for payment thereof to the said Eli Cherry, the said Anthony Burrows then and there executed his bond to the said Eli Cherry for the said sum of thirty-five dollars and fifty cents, with the intent then and there to cheat and defraud the said Eli Cherry of twenty acres of said tract of land of the value of twenty dollars; Whereas, in truth and in fact, the said plat and survey so made as aforesaid by the said Thomas R. Cofield, when delivered to the said Anthony Burrows by the said Thomas R. Cofield as aforesaid, did represent the said tract of land to contain fifty-five and one half acres of land, and the said Anthony Burrows, after the said plat came to his hands and before he exhibited it to the said Eli Cherry as aforesaid, at and in

the County aforesaid, unlawfully, knowingly, designedly, falsely, fraudulently and deceitfully did alter and change the writing of the said Thomas R. Cofield on the said plat, so that the said tract, by means of the said alteration and change, was described as containing only thirty five and one half acres, to the great damage and deception of the said Eli Cherry, to the evil example of all others in the like case offending, against the form of the statute in such cases made and provided, and against the peace and dignity of the State."

On the trial of this indictment, upon the plea of not guilty, the evidence was, that the prosecutor Eli Cherry owned a tract of land in the County of Martin, and that he agreed with the defendant to sell the same to him at one dollar per acre—that they agreed upon the boundaries, but did not know the quantity, and selected one Thomas R. Cofield to survey the same to ascertain the number of acres. It was further agreed, that, after the survey was made, and the number of acres ascertained by a plat, the surveyor should hand the plat, which he had made, to the defendant, in order to procure a deed for the said land from the prosecutor—that, in pursuance of the said agreement, Cofield, (accompanied by the prosecutor and the defendant,) surveyed the said tract of land, made a plat by lines, words and figures, and found that it contained fifty-five and one half acres of land—that the said plat contained within its course and distance, and about the middle thereof, the figures and letter 55½ A.—that the plat, with these figures upon it, was handed to the defendant—that, while the plat was in the defendant's possession, he said to a witness, "How easy it would be to alter the figure 5 into a 3, and that he would do so; and the witness must say nothing about it." The defendant afterwards handed the plat to the prosecutor, with the first figure 5 of the figures 55½ changed into the figure 3, so as to represent by the said figures 35½ acres of land,

instead of 55½ acres. The prosecutor examined the same, and believing the land contained but 35½ acres, and believing that was the plat made by the surveyor, Cofield, and having no suspicion that it had been altered, agreed with the defendant to execute a deed to him for the land embraced within the said plat. A paper writing was prepared, conveying to the defendant the land embraced within the courses and distances of the said plat, and described as conveying thirty-five and one half acres only, when it conveyed fifty five and one half acres, in consideration of thirty five dollars and fifty cents paid by the defendant to the prosecutor. The courses and distances mentioned in the deed were the same as those mentioned in the plat, with the exception of the distance of one line, as to the number of poles in the said line. The number of poles in the said line was left blank, at the request of the defendant; but there were trees at the beginning and termination of the said line, which trees were marked by the surveyor, and agreed upon by the prosecutor and defendant as the correct *termini* of the said line. The paper writing, thus prepared, was executed by the prosecutor and delivered to the defendant as his deed, with a request that the blank should be filled up shortly thereafter, because he (the prosecutor) was fearful that he (the defendant) would run beyond the line into his (the prosecutor's) land. The courses, the lines and distances of the said plat were correctly made and laid down on the said plat by the surveyor. The name of the surveyor was not to the said plat, but it was all in his handwriting except the figure 3 substituted for the figure 5.

The defendant's counsel objected, that there was a variance between the proof and the charge in the bill of indictment—that, according to the proof, it did not appear, that by 'the false and forged writing, it was made by the writing thereof that the said tract of land had been surveyed by the said Thomas R. Cofield and contained only

thirty-five and one half acres;" and further it was charged in the bill of indictment, that the fraudulent means resorted to by the defendant was with the intent to cheat and defraud Eli Cherry of twenty acres of land, whereas the proof shewed that he intended to cheat and defraud Cherry of twenty dollars and not of his land. It was further insisted by the defendant, that the number of poles being left blank, in the paper writing handed to him as the prosecutor's deed, although it appeared that the blank was afterwards filled up with the number of poles, yet it was not a deed sufficient to convey lands and tenements, because there was no evidence that the prosecutor assented to the filling up of that blank, nor was there any evidence of a re-delivery. It was further objected, that, admitting the charge in the bill of indictment to be true, it was not an indictable offence—that real estate was not embraced in the statute (Rev. Stat. ch. 24, sec. 61,) by the words used or any of them, to-wit, "money, goods, property or other thing of value"—that it was not intended by these words in the statute to include any other than personal property. It was further insisted, that, if it was an indictable offence under the statute, the bill of indictment was insufficient. 1st. Because the bill of indictment did not negative the allegation that the plat was forged and was made to appear as containing thirty five and one half acres of land. 2ndly. It was not alleged, nor did it appear by the bill, except by inference, that the deed conveyed more, or the plat actually embraced more, than thirty-five and one half acres—and, further, that it is no where alleged, that the land conveyed to the defendant was the land of the prosecutor; and, if it did not belong to him or was not conveyed with warranty, he was not and could not be defrauded.

The questions at law, which could be urged in arrest of judgment, were reserved by the Court. The Court sumed up the evidence, and charged the jury, that if the

prosecutor agreed to sell a tract of land, which he owned, and the defendant agreed to purchase the same, at the price of one dollar per acre, and they selected the witness, Thomas R. Cofied, to make a survey to ascertain the quantity, and the agreement was, that Cofield, after making the survey and plat, should hand the plat to the defendant, in order to procure from the prosecutor a deed for the land contained in the survey; and the plat embraced 55½ acres or any number of acres over 35½, and that the defendant altered, or procured another, who altered by his consent, the figure 5, so as to make it appear, as if the plat contained 35½ acres of land instead of 55½ and this was handed to the prosecutor as a true plat, with the fraudulent design and purpose of procuring a deed from the prosecutor for all the land embraced in the said plat, and the prosecutor, being misled and deceived by the defendant, and supposing that the plat exhibited to him contained but thirty-five and one half acres, executed a deed to the defendant, by which he conveyed to him fifty-five and one half acres, or any number of acres over and above thirty five and one half, in consideration of thirty-five and one half dollars paid by the defendant, the defendant would be guilty of cheating and defrauding the prosecutor of twenty acres of land, or the amount over and above the thirty five and one half acres, which he paid for, as charged in the bill of indictment; and that, although a blank was left in the paper writing, as to the number of poles of one of the lines, if the points of beginning and termination of the said line were fixed upon and agreed to by the prosecutor and the defendant, and marked by the surveyor as the *termini* of the said line, and the paper was handed to the defendant as the act and deed of the prosecutor, it was in law a valid deed to convey the land embraced in its boundaries, although the blank was filled up afterwards by the defendant, in the absence of the prosecutor and without any re-delivery by him.

The jury found the defendant guilty. The defendant moved for a new trial for misdirection, which was refused. He then moved in arrest of judgment, which last motion was sustained, and the judgment was arrested. Both the defendant and the Attorney General prayed an appeal, which was allowed.

Attorney General for the State.
Biggs and *Rodman*, for the defendant.

PEARSON, J. The judgment was properly arrested. There are three fatal objections to the indictment, 1st. Land is not included within the operation of the statute. It is true the words are very general: "Money, goods, property, or *other things of value*," "or any bank note, check or order for the payment of money. &c." But they must be construed, with reference to the nature of the offence, the mischief intended to be guarded against, and the particular terms used in connection with the general terms.—Larceny at common law was confined to "goods and chattles," it did not extend to land, because land could not be feloniously taken and carried away, except insignificant parcels thereof, and there was no mischief complained of in that regard. By the act of 1811, Ch. 814 Rev, Code. Rev. Stat. ch. 84 sec. 23. larceny is extended, so as to include "any bank note, check or order for the payment of money issued by or drawn on any bank or other society or corporation within this State or within any of the United States, &c." The 24 Sec. includes corn, wheat, cotton, rice, &c., growing or standing together in any field &c.; this was necessary because these articles, being attached to the land, did not fall within the rule at common law, but, it was supposed, fell within the mischief to be guarded against.

By the *same act of* 1811, Ch. 814, Rev. Stat. Ch. 34 Sec. 61, it is provided, that, "if any person shall know-

ingly and designedly by means of any forged counterfeit paper, &c., obtain from any person, &c., any money, goods, property or other things of value, in any bank note, &c., check or order for the payment of money, issued by, or drawn on any bank or other society or corporation within this State or any of the United States, &c., and goes on in the *very words* of the 23 Sec. and concludes by subjecting the party offending, to the pillory, public whipping not exceeding thirty nine lashes, &c., the appropriate punishment of larceny.

Thus we are furnished with a key, whereby to unlock the meaning of the Statute. It was justly considered as great a mischief to be defrauded of property by means of a forged or counterfeit paper, &c., as to be deprived of it by means of a felonious taking, and carrying away, and the object was to extend the principle to cases, where property was obtained in this fraudulent manner. Money, goods and chattles, were included in common law larceny, and bank notes, checks or orders, &c., were included in larceny as extended by statute; so the same statute under consideration is made in express terms to embrace all of these; it may be that "*other things of value*," was inserted to include corn, wheat, &c., growing, and standing ungathered, but it would be a strained construction to make it include *the very land*, for that is not the subject of larceny, at common law, and as extended by the statute. It would be, to make the corollary or sequent embrace a subject not embraced by the original proposition, which is bad logic as well as bad law.

2nd. The land was bargained for by metes and bounds, and the deed is made corresponding thereto. The charge is, that the defendant cheated Cherry out of twenty acres of land, to wit, the excess in quantity over thirty five and one half acres. But there is no averment that, in point of fact, the tract of land contained more than that number of acres; so, *non constat*, that he cheated him out of

any land, and he certainly did not do it, unless the tract really contained more than that quantity. It is true, the indictment was that the plat, made by Coffield, represented the said tract of land to contain 55¼ acres, and that the defendant altered the plat, so as to make it 35¼ acres, but that does not make good the charge, of cheating Cherry out of the excess over 35¼ acres, without a direct avowal of the existence of such excess; it may be the plat was incorrect, and that the tract contained but 35¼ acres or a less number; and, if so, Cherry was not cheated out of any land, the plat to the contrary notwithstanding.

3rd. The intent charged is, "to cheat and defraud the said Cherry of twenty acres of said tract of land, of the value of twenty dollars." It seems to us, the indictment does not "fit" the case. No more land was conveyed than was agreed upon by the original contract; so Cherry was not cheated out of any land. We do not adopt the suggestion, that the indictment should have charged the intent, to cheat Cherry out of "*twenty dollars.*" He never had the twenty dollars, and therefore it could not be said, that the intent of the defendant was "to obtain" from him that sum by means of the forged paper. The true ground of complaint is, that the defendant by means of the forged paper, induced Cherry to *execute a deed* for 55¼ acres of land upon the receipt of $35¼, and thereby obtained the conveyance without paying for twenty acres of land; so the fraudulent intent was to procure the deed upon the payment of $35¼, instead of $55¼. This is a fraud, but it does not come within the definition of any crime or misdemeanor, known either to the common or statute law. There is no error. This opinion will be certified.

Per Curiam. Ordered to be certified accordingly.

PETER ADAMS *vs.* HICKORY NUT TURNPIKE COMPANY.

The true construction of the Act of Assembly, incorporating the Hickory Nut Turnpike Company, is, that the State road, where it crosses the Blue Ridge at the Hickory Nut Gap, is not abrogated by the said charter, but is to be continued and kept in repair by the road overseers in their respective Counties, until the turnpike is completed, and that the company, for the purpose of constructing the turnpike, has the privilege, when it is located along the State road, to enter upon it, and obstruct it, when, where, and as long as is reasonably necessary, to enable them to make their improvements, and, when it is located near the State Road, the same privilege is conferred, to be exercised in a reasonable manner, in reference to the interest of the Company and the convenience of the public, the latter being made, for a reasonable time, to give place to the former.

Appeal from the Superior Court of Law of Guilford County, at the Fall Term 1850, his Honor Judge MANLY presiding.

H. W. Miller, for the plaintiff.
Bynum and Kerr, for the defendant.

PEARSON, J. The plaintiff was a contractor, for carrying the mail in stage coaches, from Salisbury to Ashville, his route passing along the State road from Rutherford to Buncombe, crossing the Blue Ridge at the Hickory Nut Gap. This was case for damages, by reason of obstructions placed in the road by the defendants, whereby the plaintiff's stages were frequently detained and in one instance a stage upset.

The defence was, that by virtue of an Act of the General Assembly, the defendant had a right to shut up the

part of the State road where the damage was occasioned, during the time allowed by said act for the construction of a turnpike; that part of the State road being "abrogated" by a grant to the defendants. His Honor, in making up the case, says, 'The only question intended to be raised in this case is, whether the turnpike company, by virtue of their charter, had a right to close up the old road, and keep it closed at pleasure." His opinion was against the defendants upon this point, and to this they except. The case is made in reference to this point alone, and we are therefore confined to it.

The act incorporates the company with a capital of $10,000, "for the purpose of making and keeping in repair a turnpike road, commencing at Cove Creek bridge in Rutherford county, thence *along or near the State road*, crossing the Blue Ridge at the Hickory Nut Gap, to Joseph Gavin's in Buncombe County." "The company shall have power to appoint commissioners to lay off and mark the location of said road." "The commissioners shall have power to assess damage in favor of any person, through whose land said road may pass. The road shall be twenty feet wide, clear of obstructions, except where side cutting may be necessary, in which case it may be twelve feet wide. The ascent or descent of no part of the road shall exceed one foot perpendicular to ten feet horizontal. *When* the road *shall be received* by a commissioner appointed by each of the County Courts of Rutherford and Buncombe, to examine and receive so much of said road, as may be situate in their respective Counties, then it may be lawful for said company to erect a toll gate, &c. The said road shall be, and is hereby declared to be a public highway, *when completed*. The charter to be null and void, unless carried into effect within two years from its passage."

It was expected that the turnpike would in some places pass along the State road, in others near it, and in others

diverge from it. But it was to cross the mountain at the same gap. The purpose was to improve the communication across the mountain, between the points designated, and the turnpike, *when completed*, was to be a public highway and take the place of that part of the State road, so as to connect the other two ends, and such part was then to be discontinued, because so far as the public was concerned, it would be no longer necessary to burthen the Counties by keeping it up; and so far as the company was concerned their profits would be interfered with.

But the defendants take higher ground, and insist, that this part of the State road was "abrogated" or discontinued, as soon as the turnpike was marked off and located by the commissioners, or at all events as soon as the work was commenced. They insist, that it would otherwise be impracticable to make these improvements, and from this they infer a legislative grant of this part of the State road and their right to shut it up, not when the turnpike was completed, but as soon as it was located and operations commenced. To this proposition we cannot yield our assent.

We learn from the case, that this was a part of the State road, and was used for transporting the mail, and we know, as a public matter, that this State road was one of the great thorough-fares, between this State and Tennessee, and the only line of communication between Rutherford, Buncombe, and several other Counties. In the absence of any express legislative enactment, discontinuing a part of this road, we believe it would be doing violence to the intention of the legislature, to discontinue it by implication, until a better road was completed and in a condition to take its place, because thereby the public would be subjected to a grievous inconvenience, and the interest of the company does not imperatively call for it, until they can demand toll.

The true construction of the charter, taking it altogether, is, that this part of the State road is to be continued and kept in repair by the road overseers in their respective Counties, until the turnpike is completed, and that the company, for the purpose of constructing the turnpike, has the privilege, when it is located along the State road, to enter upon it and obstruct it, when, where, and as long as is reasonably necessary, to enable them to make their improvements, and, when it is located near the State road, the same privilege is conferred, to be exercised in a reasonable manner, in reference to the interest of the company and the convenience of the public, the latter being made for a reasonable time to give place to the former.

If a company is incorporated to improve the navigation of a river, already used for some purposes, for flat bottomed boats or to raft timber for instance, there can be no inference of an abrogation of the right of navigation, and of a right on the part of the company to stop it, except so far as it may be reasonably necessary to enable the company to make their improvements; for the object is not to discontinue, but improve, the navigation; thus showing that the legislature is aware of the importance of the communication, and therefore cannot be presumed to intend to deprive the public of it, except so far as is reasonably necessary to make the improvements.—So, in this case, the object being, not to discontinue but to improve, a part of the road, it is to be presumed that the legislature intended the public to use it as a high-way, so far as such use is not inconsistent with the rights of the company, exercised in a reasonable manner, until there is a better road to take its place.

Per Curiam. Judgment affirmed.

THOMAS P. DEVEREUX *vs.* HENRY K. BURGWIN & AL.

Tenants in common agreed to a division of their land, and covenanted that it should be referred to A. and B. to value their respective parts, and that the party refusing to abide by the award should pay a certain sum, as *stipulated damages*, and not as a penalty. The covenant further provided, that "the valuation should be made upon such examinations and surveys, as the referees might think proper, of which they were to be the sole and exclusive judges." The award having been made and one of the parties objecting, *it was held*, upon a suit for the stipulated damages, that the award was good, notwithstanding but one of the referees made the survey, the other relying upon such survey and on his own previous knowledge of the land, the referees having, by the terms of submission, a discretionary power to make such surveys as they might think proper.

Held, further, that the award cannot be impeached in a *Court of Law*, by shewing that it was procured to be made, unfairly and by the exertion of undue influence.

Held, further, that the award cannot be impeached by shewing, that, after the submission, one of the arbitrators had become addicted to intemperance, to such an extent as to impair his mind, unless it be further shewn, that, at the time he made his award, he was so drunk as not to know what he was doing, or his intemperance had been carried to such an extent, as to reduce him to a State *of fatuity*, so that he had no mind.

These two last conclusions do not apply to cases, where the award is made under a rule of Court. There, the Court retains a supervising power, and will see that the award was not obtained by unfairness or undue means, when a summary judgment is moved for.

The party, who sues to recover the stipulated damages, is not entitled to claim interest, even from the date of his writ.

In England the rule is, that interest is to be allowed, where there has been an express provision to pay interest, or where such promise is to be *implied* from the usage of trade, or other circumstances. But for goods sold, money lent, money paid, work and labor done, or on a guarantee, interest is not allowed, unless there be an express or implied agreement. Our de-

casions have extended the rule, and for money lent, or money paid or had and received, or due on an account stated, the jury ought to be instructed to allow interest, the promise to pay being implied from the nature of the transaction. And in trover and trespass *de bonis asportatis*, the jury may, in their discretion, allow interest upon the value, from the time of the conversion or seizure, as a part of the damages, so as to compel the wrong doer to make full compensation, by charging him with the price, as at a *cash sale*.

When both parties appeal from a judgment, the Clerks of the Superior Courts must make out two transcripts, so as to constitute, as there really are, two cases in the Supreme Court. When this is neglected, the Clerk of the Supreme Court will state two cases on his docket, and charge costs in each case.

The cases of the *State* v. *Blount*, 1 Hay. 4, and *Hunt* v. *Jacks*, 1 Hay. 173, cited and approved.

Appeal from the Superior Court of Law of Northampton County, at the Fall Term 1849, his Honor Judge BAILEY presiding.

B. F. Moore and Winston, Sen., for the plaintiff.
J. H. Bryan, Barnes and Smith, for the defendants.

PEARSON, J. The parties, being tenants in common of valuable real estate, agreed upon a division, and executed a covenant to submit the valuation of the respective parts to the arbitration of Mr. Britton and Mr. Smith; but it was agreed, that either party might refuse to abide by the award, in which event the party refusing was to pay to the other the sum of $1000, which sum was declared to be *stipulated damages*, and not a penalty. The arbitrators made their award, and the defendants refused to abide by it; whereupon the plaintiff brings this action to recover the $1000.

In the covenant of submission, there is this clause: "The valuation to be made upon such examinations and surveys as the referees may think proper, of which they shall be the sole and exclusive judges."

The defendants, under the plea of "no award," offered to prove, that Smith did not go upon the land or make any examination of the premises; and insisted, that the award had not been made according to the terms of the submission. They also offered to prove, that the plaintiff had interfered with one of the arbitrators, and exerted undue influence over him; and insisted, that the award was not valid, because it had been procured by unfairness on the part of the plaintiff. They also offered to prove, that, after the submission, Mr. Britton had become addicted to intemperance to such an extent as to impair his mind; and insisted, that, for this reason, the award was not valid and was void.

His Honor rejected the evidence as immaterial, and not tending to establish the issue. To this the defendants excepted.

There is no error. By the terms of the submission, the arbitrators were to make such examination and surveys, as they might think proper; and of this they were to be the exclusive judges. Language could not be more definite; and if the arbitrators thought proper to have the examination and surveys made by one of them alone, the other depending upon his own prior knowledge of the premises, and the report of his fellow, as to the number of acres in the different tracts and the quantity of river bottom, second bottom, swash and upland, in the several tracts, the parties had no right to complain, because the abitrators in so doing acted within the terms of the agreement. There is then "*an award*"—the decision of judges of the parties' own choosing, acting within their jurisdiction (so to call it) on the terms of the submission.

The next question is, can this (judgment or) award be impeached in a *Court of Law*, by proving, that it was procured to be made unfairly and by the exertion of undue influence? It is clearly settled to the contrary:—

Upon the same principle, that, under the plea of "*non est factum*," if the execution of the deed is proven, it cannot be avoided in a Court of law by proof, that it was *procured to be* executed by means of falsehood and misrepresentation or other fraud. There must be fraud *in the "factum,"* as by substituting one paper instead of the one intended to be executed, so as to show, that the party did not intend to execute the paper he was thus made to sign, seal and deliver as his deed.

We also concur with his Honor on the third question. If it be proven, that at the time an arbitrator made his award, he was so drunk as not to know what he was doing, or if his intemperance had been carried to such an extent as to reduce him to a state of *fatuity*, so that he had no mind; it may be, that a Court of law would pronounce a paper, signed by him and purporting to be his award, to be in fact no award, for the want of a legal capacity to make one; in the same way, that a paper, signed, sealed and delivered under such circumstances, is *not the deed* of the party.

The defendants did not pretend to be able to make any such proof, but offered merely to show, that his "mind was impaired"—was not as strong and vigorous as it had been. This might have given either party a right to insist upon substituting another arbitrator in his stead, but it ought not to have been heard as ground to avoid the award.

These conclusions, of course, do not apply to cases, where the award is made under a rule of Court. There, the Court retains a supervising power, and will see that the award was not obtained by unfairness or undue means, when a summary judgment is moved for.

The judgment is affirmed, so far as it is appealed from by the defendants.

The plaintiff insisted, that he was entitled to interest upon the $1000, from the time the defendants refused to abide by the award—if not, from the time he filed his bill

(which bill was filed to compel the specific execution of the contract)—if not, at least from the time his writ issued. His Honor refused to allow any interest whatever; and to this the plaintiff excepts, and he also appealed. There is no error. It is clear, the plaintiff had no claim to interest, at all events until after his proceeding in Equity was determined; for, by his bill, he seeks a specific performance of the contract, and insists, that the defendants had forfeited their right to refuse to abide by the award and pay the $1000 stipulated damage, on account of their laches in refusing to say, definitely, whether they would or would not abide by the award, and pending his proceeding in Equity, he would not have received the $1000.—How can he claim interest for the time, during which he was denying the right of the defendants to pay the money? See 5 Ire. Eq. 351. But we do not think he is entitled to interest even from the date of his writ. The act of 1786, Rev. Stat. ch. 13, sec. 4, provides, that all bonds, &c., and signed accounts shall bear interest. This act is amended in 1808, Rev. Stat. ch. 31, sec. 96, directing the Clerk, upon judgments by default, to calculate interest without a jury of inquiry. We do not consider this act changes the law, in regard to interest, in cases, where it was allowed before, which do not come within its provisions.

The question then is, independent of this statute, is interest allowed by law in cases like the one under consideration?

Interest is allowed, where there has been an express provision to pay interest, or where such promise is *to be implied* from the usage of trade, or other circumstances. 2 B. & C. 349, *Higgins* v. *Sargent.* For instance, where a party agrees to give a note on a contract for goods or otherwise, and fails to give it—he is liable for interest from the time such note would have arrived at maturity. But for goods sold, money lent, money paid, work and labor done, or on a guarantee, interest is not allowed, un-

less there be an express or implied agreement. This is the rule according to the English cases. Our decisions have extended the rule, and for money lent, or money paid, or had and received, or due on an account stated, the jury ought to be instructed to allow interest—the promise to pay being implied from the nature of the transaction; *State* v. *Blount*, 1 Hay. 4; *Hunt* v. *Jucks*, id. 173; and, in trover and trespass *de bonis asportatis*, the jury may in their discretion allow interest upon the value, from the time of the conversion or seizure, as a *part* of the damages, so as to compel the wrong doer to make full compensation by charging him with the price, as at a *cash sale*.

We are not at liberty to relax the rule any further; and to allow interest in this case would carry relaxation to the extreme.

The defendants have not had the money or the property of the plaintiff. It is true, the plaintiff has sustained damage to some extent, but the parties have not left the amount to be ascertained by a jury. They preferred to fix it themselves, and, in the absence of any stipulation for interest, there is no principle, by which the plaintiff has a right to call on the Court to allow interest, or to leave it to the discretion of the jury to do so. For, the amount of damage is fixed; and the jury cannot enter into the consideration of the question of damage, so as to increase it, unless they were also at liberty to lessen it.

The judgment must be affirmed, so far as it is appealed from by the plaintiff.

In this case exceptions were taken by both plaintiff and defendant—both parties appealed, and the judgment is affirmed as against both of the appellants. This raises a difficulty as to the costs. To prevent a recurrence of the same difficulty, and to prevent cases from being made too complicated, the Clerks of the Superior Courts will in future, when both parties appeal, make out two transcripts,

so as to make, as there really are, two cases in this Court. In this case, the Clerk of this Court will state two cases on his docket, and charge costs against the appellant in each case.

PER CURIAM. Judgment accordingly.

THE STATE TO THE USE OF BURTON W. HATHAWAY *vs.* JAMES N. FLOYD & AL.

A householder, who wishes to avail himself of the provisions of the Act of Assembly of 1844–5, ch. 32, Ire. Digested Manual, p. 118, may do so, by making application and procuring the assignment to be made according to the Act of Assembly, at any time, even after a levy of an execution or attachment, before the property is changed or converted by a sale.

Appeal from the Superior Court of Law of Chowan County, at a Special Term in December 1850, his Honor Judge BATTLE presiding.

This was an action of debt, on a bond executed by the defendant, Floyd, and the other defendants, as his sureties, on his being appointed a constable of Chowan County. The plaintiff produced and proved the execution of the bond; and shewed that he sued out, and placed in the hands of the defendant, Floyd, an attachment against one Caffee, an absconding debtor; that the same was levied by Floyd on goods and chattels of the defendant therein, sufficient to satisfy the amount of the attachment; that final judgment was regularly had thereon, the goods and chattels condemned, and a *venditioni exponas* awarded, which was also placed in the hands of the defendant,

Floyd. Floyd was proved to have been a constable for the said County, at the time of the issuing of the attachment and its levy, and also at the time the *venditioni exponas* came to his hands, and for some eleven months afterwards. The defendants then shewed, that, on the levying of the attachment, Floyd placed the property, by the plaintiff's directions, in the hands of a Miss White, who was a sister of Caffee's wife, and was living in his family; and that, on the award of the *venditioni*, the plaintiff further directed him to let the property remain in her hands, until Caffee's return home, he being expected home by his family, and that the constable indulged accordingly. And it was further in evidence, that the plaintiff directed the defendant, Floyd, to permit the property to remain in Miss White's possession, until the 1st day of July. The plaintiff then proved, that Caffee returned home and remained some four or five days, and went off again, but there was no evidence that Floyd knew of his return or departure; and it was also proved, that he again returned and was seen by the defendant, Floyd, and remained in Chowan for some weeks. The defendants then proved that, by three freeholders and a justice of the peace, the articles levied on under the attachment and directed to be sold by the *venditioni exponas*, were assigned to the said Caffee, under the provisions of the Act of 1844–5, ch. 32, *Ire. Digest. Manual*, p. 118. The assignment was on the 14th day of June, preceding the 1st day of July aforesaid, and after Caffee's second return, and after the seizure under the attachment and the award of the *venditioni*, and while the latter was in Floyd's possession. On this assignment being made, Floyd abandoned the control of the property.

The plaintiff contended, that none of the property was protected from this claim, for two reasons: First, that the property of an absconding debtor was not protected against an attachment, and therefore the Act did not ap-

ply; Secondly, that as the property, which consisted in part of household and kitchen furniture, in addition to beds and bedding, was divested out of the defendant, before the assignment, it was, therefore, not protected under and by virtue of the act. The defendant contended, that, under the act aforesaid, the property might be laid off at any time before an actual sale under an execution, notwithstanding a lien by execution or attachment thereon; and that the property, under the circumstances of the case, was protected, and, supposing the evidence to be believed, the jury ought to find for the defendants. Of this opinion was the presiding Judge, and he so charged the jury, who found a verdict for the defendants. From the judgment thereon, the plaintiff appealed.

Heath, for the plaintiff.

A. Moore, for the defendants.

Pearson, J. The failure to collect the debt is fully accounted for, by the facts stated in the case, and we concur in the opinion that the defendants were not liable.

The delay in making sale was by the order of the plaintiff, who directed the goods to be left in charge of Miss White; and, after the debtor returned, he had a right to avail himself of the provisions of the Act of the General Assembly, passed in 1844, ch. 32—118 *Iredell's Digested Manual*. He was within the words of the statute, "a housekeeper," and notwithstanding the levy, had a right to have the property "laid off and assigned" as the portion to which he was entitled under the provisions of the act. The "*poor debtor*" is in time, if he makes his application and procures the assignment to be made, at any time before the property is changed and converted by a sale.

Per Curiam. Judgment affirmed.

JOSEPH HARDY & AL. vs. JOHN WILLIAMS, ADM'R.

A. and B. being infants and tenants in common of a tract of land, C. their mother, who was the administratrix of their deceased father, rented out the land to D. who entered into possession of it. The infants afterwards brought a bill in Equity against C. for an account of their estate and charged her with having acted as their guardian in renting out the land, and obtained a decree for the amount ascertained to be due, including the rent; but it did not appear that the decree had been satisfied. *Held* that D. not being a party to these proceedings in Equity, nor a privy to either of the parties, could not avail himself of them, so as to prevent his being sued as a trespasser.

The case of *Hardy* v *Williams*, 0 Ire. 177, cited and approved.

Appeal from the Superior Court of Law of Bertie County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

This was an action of trespass *quare clausum fregit.*

It was in evidence, that the plaintiffs were seised and in possession of the *locus in quo* in the year 1841, as the heirs at law of their father, Edward Hardy: that they were infants and without a guardian: that Joseph Hardy, one of the plaintiffs, arrived at full age twelve months before the institution of this action; and the other plaintiff is still an infant. It was further in evidence, that Mrs. Hardy was the administratrix of said Edward Hardy; and that one William Cherry, an agent of Mrs. Hardy, rented out at public auction the *locus in quo*, and one Holley bid off the same and assigned his bid to the intestate of the defendant and the said William W. Cherry; and that the defendant's intestate and the said W. W.

Cherry entered on the premises, and, during the year 1841, cultivated the lands and used the fishery attached thereto. It was in evidence further, that, at the Fall Term 1845 of Bertie Court of Equity, the plaintiffs, by their guardian, Humphry H. Hardy, filed their bill against Mrs. Hardy, the administratrix of the said Edward Hardy, for an account and settlement of the estate of the said Edward, in which they claimed for the rents of land received by the administratrix; and the administratrix, in her answer to the said bill, admitted, that she appointed by parol the said Willam W. Cherry her agent for the settlement of the said estate, and that the said Cherry had rented out the lands of the plaintiffs. An account of the said estate was taken, in which the administratrix was charged with the rents of other lands belonging to the plaintiffs, and also with the rent of the *locus in quo* for the year 1841, at the sum bid for the same by the said Holley; and, at the Fall Term 1847 of the said Court of Equity, a decree was entered in favor of the plaintiffs against the administratrix for the balance due, as appearing upon the said account; and in which decree it is declared, that the administratrix had received the rents of lands belonging to the plaintiffs, for which she was liable to account It did not otherwise appear, that the said Holley or the intestate of the defendant, or the said Cherry had paid the rent of the *locus in quo* to Mrs. Hardy; and there was no evidence that the said decree had been paid by the administratrix.

The Court charged, that, as the plaintiffs, by their guardian, and under the sanction of a Court of Equity, had elected to treat their mother as guardian and charged her with the rent of the land in question, they could not now convert the defendant's intestate into a wrong-doer.

The jury returned a verdict for the defendant. Judgment for the defendant, from which the plaintiffs appealed to the Supreme Court.

Biggs, for the plaintiffs.

W. N. H. Smith, for the defendant.

PEARSON, J. The Court charged, "that as the plaintiffs by their guardian, and under the sanction of a Court of Equity, had elected to treat their mother as guardian and charged her with the rent of the land, they could not now convert the defendant's intestate into a wrong doer."—There is error.

In *Hardy* v. *Williams*, 9 Ire. 177, the same facts were presented between the same parties, in an action on the case in assumpsit for the rent of the land, and it was held that the action could not be sustained, because there was no privity between the plaintiffs, and the defendant's intestate, and, "that, although it was at the election of the plaintiffs, to treat their mother as a wrong doer, or as their agent, they were not at liberty, by *supposing* her to be an agent, thereby to affect the rights of third *persons*, and make a privity, where none before existed."

This was a decision as to the legal effect of the proceedings and decree in Equity, by the plaintiffs against Mrs. Hardy, in which she was charged with the rent of the land, and it was held that the proceedings and decree did not have the legal effect of creating a privity of contract between the plaintiffs and the defendant's intestate, because he was a *third person* and *his rights could not be affected*. For the very same reason his *liability* cannot be affected. When an attempt was made to charge him as *a privy*, he escaped upon the ground, that he was a third person and not bound by those proceedings, and now, that an attempt is made to charge him as a *wrong doer*, he cannot shift his ground, and involve the aid of those proceedings to relieve him from the position of a wrong doer, by converting him into a privy. Estoppels must be mutual, and who is not bound by them cannot take advantage of them.

If the decree had been satisfied, then the defendant could have availed himself of it, not as an estoppel, but, a *satisfaction* of the cause of action.

PER CURIAM. Judgment reversed and *venire de novo*.

REBECCA WILSON *ex.* QUINTON PURCELL & AL.

Property passes by a sale and delivery, notwithstanding an *executory* agreement to sell to another, and the receipt of a part of the price.

Appeal from the Superior Court of Law of Rockingham County, at the Fall Term 1850, his Honor Judge MANLY presiding.

This was an action of trover for a mare, in which it appeared, that the defendants had, on the 10th of November 1847, converted the mare, by virtue of a process of *fi fa*. against Urias Wilson, a son of the plaintiff.

George Wilson, a son living with his mother, testified, that he bought the mare of a man of the name of Woollen in the Spring of 1847, and after trying and finding, that she worked kindly, sold her to his mother, and his mother, Urias having no animal with which to cultivate a crop, loaned the mare to him.

Henry Suthern, who worked a part of the plaintiff's farm in 1847, also testifies, that George made the purchase of Woollen, and not long afterwards sold to the mother, and that the mother lent the mare to Urias.

Betsy Baker, defendants' witness, swore: that the plaintiff said, she had found out that the mare was bought

by George for Urias, and she (the mother) was angry about it, and that George should make Urias pay him for it, else she would turn him off. It was accordingly agreed between the sons, that Urias was to pay George for the mare, as he might want it. She saw a small sum paid. This witness, as well as several others, testified, that Urias worked and fed the mare during the summer of 1847.

A man by the name of Baker, also a witness in behalf of the defendants, swore, the mare was bought by Urias, and that he worked her and used her and claimed her as his property.

Pascal, another witness for the defendants, also swore, that Urias was the purchaser of the mare; that she was selected by a man named Stewart, and that Urias rode her home and claimed her as his own.

Stewart, designated by the last witness as the person, upon whose judgment the purchase was made, swore, that he was not present at the sale at all, and knew nothing of it.

The defendants' counsel, in the course of his argument, when noticing the testimony of George Wilson, asked instructions from the Court, to the effect, that if he was believed to be corruptly false in any material particular, his testimony should be rejected altogether. In the reply of the plaintiff's counsel, this rule for judging of witnesses was not denied, but expressly admitted to be correct.

The Court in the explanation to the jury did not notice the matter, for the reason, that the Court did not then, and does not now perceive, how it could be applicable to the plaintiff's witness.

In the course of his Honor's charge, he informed the jury, that if George sold and delivered the mare to his mother for a reasonable consideration, the property in the animal would pass, although George at the time might be under a promise to let his brother Urias have the mare

whenever he might pay for her, and although they might believe further, that this arrangement had been partially carried into effect by payment of a portion of the money.

This part of the charge was excepted to, because of a want of evidence to make it pertinent.

Under other instructions from the Court, not objected to, the jury found a verdict in favor of the plaintiff.

Rule for a new trial was discharged. Judgment and appeal.

Kerr, for the plaintiff.

Morehead and Miller, for the defendants.

Pearson, J. In the course of his Honor's charge, he informed the jury, that, "if George sold and delivered the mare to his mother, for a reasonable consideration, the property in the animal would pass, although George at the time might be under a promise to let his brother Urias have the mare whenever he paid for her, and although they might believe further, that this arrangement had been partially carried into effect by payment of a portion of the money."

This part of the charge was excepted to.

His Honor announced a clear proposition of law, that property passes by a sale and delivery, notwithstanding an *executory* agreement to sell to another, and the receipt of a part of the price. This part of the charge, we think, was pertinent, and was called for, to prevent a misapprehension on the part of the jury, as to this question of law. In fact it was the point upon which the case turned.

Per Curiam. Judgment affirmed.

DAVID WHARTON vs. SOLOMON HOPKINS.

It is the settled law in this State, that a debt, due by an assignor of a bond or note at the date of the assignment, may be pleaded, as a set off to an action by an assignee after maturity; but this departure from the Statute, Rev. Stat. ch. 31, sec. 80, is put on the ground, that a liberal construction is necessary to prevent evasion and injustice.

Where it is shown this injustice will not result, the rule is different. As when the assignor, at the date of the assignment, had an account against the defendant in the action, larger in amount than that which is attempted to be set off. *Held*, that the defendant could not avail himself of his account, as a set off, in an action by an assignee, on a note or bond assigned after maturity.

The case of *Haywood v McNair*, 3 Dev. 231, 2 Dev. & Bat. 283, cited and approved.

Appeal from the Superior Court of Law of Guilford County, at the Fall Term 1850, his Honor Judge MANLY presiding.

H. W. Miller, for the plaintiff.

Mendenhall and Morehead, for the defendant.

PEARSON, J. This was an action in case upon a promissory note. Hogg and Lindsay assigned the note sued on to the plaintiff, after maturity. The defendant relied on an account against Hogg and Lindsay, which he held at the date of the assignment, as a set off. The plaintiff opposed this set off by proof, that, at the time of the assignment, Hogg and Lindsay, besides the note, held an account against the defendant, of an amount greater than his account.

It was decided in the Court below, that this proof defeated the set off. After a verdict and judgment against him, the defendants appealed.

We think there is no error.

At common law, if a bill of exchange was assigned before maturity, the assignee took it subject only to endorsed credits; if, after maturity, he took it subject to any legal defence, that might have been made to it, in the hands of the assignor, at the date of the assignment; for it was dishonored, and the assignee was not allowed to evade the defence by transferring it to a third person. The Statute of Ann puts promissory notes, and our statute notes under seal, on the same footing with bills of exchange. In the mean time the statute in regard to set offs created a new legal defence; and the question was presented whether this new defence existing against the assignor at the time of the assignment, was available against the assignee?

It is settled in England, after much hesitation, *Burrough* v. *Moss*, 10 B. & C. 558, that this new defence is not available, and that the suit of the assignee can only be met by a defence, existing against the assignor at the date of the assignment, which was *connected* with the bill, as a payment; but that a set off of a debt against the assignor, being a thing collateral and unconnected with the bill, is not a defence at law, although the bill was assigned after maturity, because the words of the statute embrace only a mutual debt, which the defendant holds against the plaintiff, and does not extend to a debt, which he holds against the plaintiff's assignor.

It is settled in this State, that this new defence is available, and that the principle of the common law applies, so as to bring it within the *meaning* of the statute of set offs. *Haywood* v. *McNair*, 3 Dev. 231, 2 Dev. & Bat. 283.

It is unjust to attempt to evade a defence by making a transfer of a bill or note after maturity, and the principle

applies as forcibly to a defence given by statute, as to one existing at common law To allow any defence to be thus evaded, would be a violation of the maxim, "no man shall take advantage of his own wrong," which is as fully recognised in Courts of Law as in Equity. It is true the set off is not *connected* with the bill or note, and is collateral and may or may not be pleaded, as the defendant chooses; but what right has the holder to deprive him of this election? and is not a liberal construction of the statute to be adopted, when it is necessary to prevent an evasion of its enactments and a manifest wrong?

It seems to us, our Court has taken the true view of the subject, and that the English Judges have fallen into the error, "*haeret in litera, haeret in cortice.*" Indeed, their decisions are not reconcileable. When a factor sells goods without disclosing his principal, in an action by the principal, the purchaser may make any defence that he could have made, if sued by the factor. He may plead, as a *set off* to the action of the principal, a *debt due by the factor.* "The principle is, the purchaser shall not be defrauded of a legal defence, by the introduction of a third person, to whom he is a stranger." *George* v. *Clagett*, 7 T. Rep. 355. Barrington on set off, 44. This is a departure from the words of the statute, to prevent evasion and injustice, and the reasoning would seem to call for it with as much force, so as to allow, as a set off to the action of the assignee after maturity, a debt due by the assignor. It is true the English cases take a distinction between mutual *credits* and mutual *debts*. The distinction is not substantial, when both debts are at maturity, and nothing remains to be due, but to make the application of one in satisfaction of the other. If a departure from the words of the statute is justified in the former case, it must be so in the latter, where transfer is made after maturity to evade a legal defence.

Be this as it may, it is settled in this State, that a debt due by the assignor at the date of the assignment may be pleaded, as a set off to the action by the assignee after maturity; and this departure from the words of the statute is put on the ground, that a liberal construction is made necessary to prevent evasion and injustice. And the question presented in the case under consideration, is, whether this necessity is not met and removed by proof, that, at the date of the assignment, the assignors had an account? We think this fact removes the ground for making a departure from the words of the statute, because the reason ceases. The assignors did no wrong, for they had an account, to which the set off might be applied and there was, consequently, no attempt to evade a legal defence.

But it is said, the defendant is deprived of his right to apply his set off to the note or the account, as he might elect. This is true, but his legal defence is not evaded; and at most he loses only the right of making a capricious application of his debt as a set off, supposing him to have it. No injustice is done, for it can make no difference to him, whether he pays the note or applies his account, as a set off to the account of the assignors, or applies his set off to the note and pays the account. There is no evasion of his legal defence and no injustice done to him, by refusing to allow his set off to the note, or the contrary. The negociability of the note is not unnecessarily trammelled, by which means the assignors are enabled to raise by a transfer the money, which he ought to have paid, and the policy of the statute, which seeks to avoid a multiplicity of actions, is subserved; for, if the set off is allowed, the assignee must sue the assignors, and they must sue the defendant, making two additional actions necessary, instead of one. The defendant's right to apply his debt to the note, or to hold it back for the account, if the suit was in the name of the assignors, is

assumed, but, as above remarked, it would be a capricious application, and he can take no benefit from it, if the assignors chose to include both causes of action in the same declaration.

Upon the same reasoning, it is held in the English cases of a sale by a factor, that, if, before all the goods are delivered, the purchaser has notice of the principal, then his set off of a debt due by the factor will not avail, for the reason ceases; and he has no right to complain, that he is defrauded of a legal defence. "Justice is on the other side;" and there is in such cases no gound to depart from the words of the statute. Babington on set off, 45, and the cases there cited.

PER CURIAM. Judgment affirmed.

JOHN McLEOD vs. J. H. KIRKHAM.

In the case of a proceeding under the insolvent debtor's law, the Court has authority to permit the schedule to be amended, so as to make more certain the description of the defendant's interest in matters there set forth, at any time before the oath is administered; and if the plaintiff is surprised, it is ground for a continuance.

It is sufficient to file the evidence of the debts, set out in the schedule, which are in the possession and control of the defendant, at any time before the oath is administered.

It being a matter of public notoriety, that proclamation money is wholly worthless, it is not necessary to state in the schedule the amount thereof with nicety, or to file the same.

Appeal from the Superior Court of Law of Montgomery County, at the Fall Term 1849, his Honor Judge BATTLE presiding.

This was an application to be discharged under the insolvent debtor's act.

The defendant was arrested under a writ of *ca. sa*, returnable to this term of the Superior Court of Law for the County of Montgomery, and gave bond for his appearance to take the benefit of the act for the relief of insolvent debtors. He accordingly issued a notice, which was regularly served upon the plaintiff, more than ten days before the first day of this term. The plaintiff objected, that the notice was insufficient, but the Court overruled the objection. The defendant filed with the Clerk of the Court, ten days before the first day of this term, his schedule, but did not file with the said Clerk the notes and other papers, therein referred to, until the second day of this term, on which day the plaintiff filed the exceptions. The Court decided, that no further description of the claims to property in England or Scotland, or of the amount of the proclamation money, was necessary, but that the description of the defendant's interest in his wife's land in the County of Halifax, and his interest in the pension claims was not sufficiently specific, and, on his motion, allowed him to amend his schedule in that particular. The amendment having been made to the schedule, the defendant, by his counsel, moved the Court, that he should be allowed to swear to the same, and thereupon to be discharged. The plaintiff opposed the motion, because:

1st. The notice was insufficient.

2nd. The notes, accounts, proclamation money, &c, were not filed with the schedule ten days before the first day of the Term

3rd. The amount of the proclamation money was not sufficiently specified.

4th. The plaintiff's interest in the English claim was not sufficiently set forth.

5th. The Court allowed the defendant to amend his schedule without any authority for so doing; and insisted, that he could not swear to his schedule at the term, at which the amendment is made.

6th. The defendant has not filed at all the notes and judgments against Medlin, Martindale and Campton, nor the constable's receipt for the same. The plaintiff further objects, that neither the notes, or judgments against Medlin, Martindale and Campton, nor the constable's receipt for the same, are filed at all, and, for that reason, the defendant could not take the oath.

The Court overruled all these objections, and ordered, that the defendant be allowed to swear to his schedule, and thereupon to be discharged. From which order, the plaintiff prayed an appeal to the Supreme Court, which was granted.

Kelly, for the plaintiff.
Morehead, for the defendant.

PEARSON, J. None of the objections to the right of the defendant, to be discharged under the insolvent law, are tenable, and there is no error.

1st. The notice, a copy of which and of the schedule was served on the plaintiff, gave full information "of the intention of the defendant to avail himself of the benefit of the act."

2nd. We think the Court had authority to permit the schedule to be amended, so as to remove the objection for the want of certainty in the description of the defendant's interest in several matters there set forth, at any time before the oath was administered, and, if the plaintiff was in any way surprised, it was ground for a motion to continue.

3rd. It was sufficient to file the evidence of the debts set out in the schedule, which were in the posses-

sion and control of the defendant, at any time before the oath was administered. There is no reason for requiring them to be filed at the same time with the schedule. It may be they are not in the defendant's possession, and every useful purpose is answered, if they are delivered at the time the discharge is moved for.

4th. The defendant assigns a sufficient reason for not filing the notes and judgments against Medlin, Martindale and Campton. The schedule set out the fact, that the papers are in the hands of one Putney, a constable in the City of Raleigh. They are thus put within the control of the officer, in whom the title is vested by force of the statute for the benefit of the creditors. There is no evidence that the defendant had a constable's receipt for those papers.

5th and 6th. It is a matter of public notoriety that proclamation money is wholly worthless and of no value, and the objection because the amount thereof is not stated with precision, and because the same was not filed, cannot be sustained.

PER CURIAM. Judgment affirmed.

THE STATE *ex.* JOHN TILGHMAN.

In order to make the declarations of a deceased person evidence, as "dying declarations," it is not necessary that the person should be *in articulo mortis* (in the very act of dying); it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn, as if an oath had been administered.

A witness cannot be admitted to state, that "he thought, the deceased thought, he would not die from his wounds." He cannot give his own opinion, but only depose to the state of the wounds of the deceased and what he *then* and *there* said and did, from which the Court may decide what he thought of his condition.

If the deceased, at the time he made the declarations, was, *in fact*, in a condition to make them competent evidence, a hope of recovery, at a subsequent time, would not render them incompetent.

There is a distinction between a cause for a *new trial* and a cause for *mistrial;* the former is a matter of discretion—the latter a matter of law.

Where, on a trial, the circumstances are such, as merely to put suspicion on the verdict, by shewing, not that there *was*, but that there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it; it is matter within the discretion of the presiding Judge. But *if the fact be*, that undue influence was brought to bear on the jury; as if they were fed at the charge of the prosecutor or the prisoner; or if they be solicited and advised how their verdict should be; or if they hear other evidence, than that which was offered on the trial; in all such cases, there has been, in contemplation of law, *no trial*, and this Court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner.

Where the facts, in relation to the jury on a trial for murder, were, that the jury were placed in the charge of an officer and confined in the ordinary

jury room; that they retired from the Court on Thursday at 6 P. M. and rendered their verdict on Saturday at 10 A. M.; that while out, the members of the jury separated at various times to obey calls of nature—that each one separated himself from the others, more than once for this purpose, and one of them as often as six times; that, when they did this, they went, one at a time, under charge of an officer, and, during such absence, the other jurors remained together in the jury room, with the door locked; that they went about fifty yards from the Court-house, and returned as soon as practicable, holding no intercourse with any one; that one of the jurors separated himself from his fellows, and visited a drug store, about one hundred and fifty yards from the jury room, for the purpose of procuring medicine, being sick; that he went under the charge of an officer, and held no conversation except with the keeper of the drug-store, who asked him if they had agreed on their verdict, to which he replied, "they had not;" that this store was in the most public place in the town of Newberne; that another juror separated himself from his fellows and stood on the outside of the jury room, near the door closed, and conversed privately for ten or fifteen minutes with a third person, but what was said did not appear; that the jurors also ate and drank, while out, but not to excess; that a part of the time they did so with permission of the Court, but when enjoined by the Court not to eat or drink, they violated this injunction, contrary to the wishes of the officer, who had them in charge; that several jurors wrote notes and dropped them from the windows of the jury room, and also received notes from persons not of the jury, but neither the contents of the notes nor the names of the persons, to whom sent or from whom received, appeared; that some of the jurors conversed from the windows with persons in the street, on various subjects and about this suit, but what was said did not appear; and that some servants and small children had access to the jury room, the servants for the purpose of carrying food and clothing to the jurors, and the children to see their fathers: *Held*, that these facts might, in the discretion of the presiding Judge, have been a good cause for granting a new trial, but they could not justify the Court in declaring, as a matter of law, that there was a mistrial.

The admission of dying declarations, as evidence, is not in opposition to that part of the Bill of Rights, which says, that, "In all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony."

The case of the *State* v *Miller*, 1 Dev. & Bat. 500, cited and approved.

Appeal from the Superior Court of Law of Craven County, at the Fall Term 1850, his Honor Judge Ellis presiding.

The defendant was tried for murder, upon the following indictment, to wit:

STATE OF NORTH CAROLINA, } *Superior Court of Law,*
Lenoir County, } Fall Term 1849.

The Jurors for the State upon their oath present, that John Tilghman, late of the County of Lenoir, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the fifteenth day of August in the year of our Lord one thousand eight hundred and fifty, with force and arms, at and in the County of Lenoir aforesaid, in and upon one Joseph J. Tilghman, in the peace of God and the State then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said John Tilghman a certain rifle, of the value of five shillings, then and there loaded and charged with gunpowder and one leaden bullet, which rifle he, the said John Tilghman, in both his hands then and there held, to, against and upon the said Joseph J. Tilghman then there felonously, wilfully, and of his malice aforethought did shoot and discharge; and that the said John Tilghman with the leaden bullet aforesaid, out of the rifle aforesaid, then and there by force of the gunpowder, shot and sent forth as aforesaid, the said Joseph J. Tilghman in and upon the right side of the forehead of him, the said Joseph J. Tilghman, a little above the right eye of him, the said Joseph J. Tilghman, then and there felonously, wilfully, and of his malice aforethought did strike, penetrate, and wound, giving the said Joseph J. Tilghman then and there with the leaden bullet aforesaid so as aforesaid shot, discharged and sent forth out of the rifle aforesaid by the said John Tilghman, in and upon the said right side of the forehead of him the said Joseph J. Tilghman, a little above the right eye of him the said Joseph J. Tilghman one mortal wound of the breadth of one inch and of the depth of six inches of

which said mortal wound the said Joseph J. Tilghman then and there instantly died: And so the Jurors aforesaid upon their oath aforesaid, do say, that the said John Tilghman, the said Joseph J. Tilghman in manner and form aforesaid feloniously, wilfully and of his malice aforethought did kill and murder, against the peace and dignity of the State: And the Jurors aforesaid, upon their oath aforesaid, do further present, that John Tilghman, late of the County of Lenoir and State of North Carolina, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the fifteenth day of August in the year of our Lord one thousand eight hundred and fifty, with force and arms at and in the County of Lenoir aforesaid, in and upon one Joseph J. Tilghman, in the peace of God and the State then and there being, feloniously, wilfully and of his malice aforethought did make an assault; and that he, the said John Tilghman, then and there with a certain rifle, of the value of five shillings, which he, the said John Tilghman in both his hands then and there had and held, the said Joseph J. Tilghman in and upon the right side of the head of him the said Joseph J. Tilghman then and there feloniously, wilfully and of his malice aforethought did strike, penetrate, and wound, giving unto him, the said Joseph J. Tilghman, then and there with the said rifle by the stroke aforesaid in manner aforesaid, in and upon the right side of the head of him the said Joseph J. Tilghman, one mortal wound of the length of three inches and of the depth of three inches, of which said mortal wound the said Joseph J. Tilghman then and there instantly died; and so the jurors, aforesaid, upon their oath aforesaid, do say, that the said John Tilghman, the said Joseph J. Tilghman, in manner and form aforesaid, feloniously wilfully and of his malice aforethought did kill and murder, against the peace and dignity of the State.

The prisoner, upon his arraignment, pleaded not guilty

The bill was found by the Grand Jury of Lenoir County at the Fall Term 1850, and the case was removed by the State, upon the affidavit of the Solicitor, to the County of Craven, where it was tried at the present Term of the Court.

The Solicitor called, as a witness for the State, one Joseph Wilson, who testified, that he knew the prisoner at the bar, and also the deceased, Joseph J. Tilghman: They both lived formerly in Lenoir County, where Joseph J. Tilghman died on the fifteenth day of August, A. D. 1850: that in the afternoon of that day, a few hours before night, the deceased parted with the witness at a hog pen on the land of the deceased, where he had gone to feed his hogs: that the deceased started towards his dwelling house, about four hundred yards distant, and the witness went to resume his labor, at which he had been engaged a short distance from the hog pen: that, in about eight or ten minutes after the deceased left, he heard the report of a rifle gun in the direction in which the deceased had gone: that the witness, upon hearing this, walked a short distance towards the place, from whence the report emanated, when he saw the deceased walking rapidly towards his house, and apparently staggering: that he had his hat on his head at the time: that the witness returned to his work, and in a very short time thereafter heard an alarm at the house of the deceased; when he left his work and ran as speedily as he could to the house: that when he reached there he saw the deceased sitting in his door, bleeding profusely, and his wife was engaged in cutting off his hair, and in an effort to stop the flowing of blood: that the deceased had a wound on each side of his head, and one in the forehead just above the right eye, from which latter the blood was flowing: that, at the request of the deceased, witness started immediately to Kinston, about seven miles distant, for a physician, and

as he started, he passed along the road, leading from the hog pen to the house of the deceased, when he saw a wallet with corn in it lying in the road, about two or three hundred yards from the hog pen, which he recognised as the same the deceased had while feeding his hogs at the time referred to. This witness further said that he went to Kinston as soon as he could and without delay, and when he returned he saw Joseph J. Tilghman at his house, and he was then dead. The witness also stated, that upon examination the same afternoon he saw a puddle of blood in the road, leading from the hog pen to the house of the deceased, about twenty-five or thirty steps from the wallet, and nearer the hog pen: that he saw the tracks of a barefoot person, pointing both ways between the wallet and puddle of blood, and that the deceased had on no shoes when he last saw him at the hog pen: that there was no blood between the wallet and the puddle spoken of, but there were frequent marks of blood between the wallet and the house of the deceased: that there was an impression upon the ground at the place, where the puddle of blood was, similar to one made by a person lying down: that this witness lived with the deceased at the time as a laborer.

The Solicitor then proposed to prove by this witness, that the deceased told him just before his death, that the defendant inflicted the wounds upon him, of which he died.

The prisoner's counsel objected to the testimony, and the Court decided, that it could only be admitted as the dying declarations of the deceased, made when all hope of recovery had forsaken his mind, and when he entertained the belief, that he would speedily die from the effects of the wounds he had received, and that as yet such did not appear to be the case.

The Solicitor was then permitted to lay the grounds for the admission of this evidence by calling witnesses to

prove the condition of the deceased's mind, at the time the declarations were made.

For this purpose Dr. Woodley was called by the State, who testified, that he called to see the deceased on the fifteenth day of August last at the summons of the witness, Wilson: that he found him dead when he reached his house: that the deceased had a wound two and three fourths or three inches long on the left side of the head laying bare the skull bone; on the right side of the head there was another wound, that fractured the skull and detached a small portion of the skull bone: that there was a puncture wound just above the right eye, which turned, after it reached the skull bone, without breaking it, in the direction of the ear, passing under another bone below the temple and extending down in the neck. The witness probed it to the depth of three or four inches; thought it a gun shot wound, though he did not find the ball or search for its termination. This witness was of opinion, that either this wound or the one upon the right side of the head would have produced death. The witness stated, that he was a practising physician, professing peculiar knowledge and skill upon the subject of wounds.

The State then called Mrs. Susan Tilghman upon this part of the case, who testified, that she was the widow of the deceased, and was at home on the fifteenth of August, when the deceased returned home with a wound upon each side of the head and one above the right eye: that he was bleeding when he came: that he said to the witness, "I shall leave you a widow before to morrow morning:" that she and deceased then had some talk about the disposition of his property after his death, when they concluded it would be better to sell the land and keep the negroes: that she told the deceased, she thought, if the blood could be stopped, he would yet recover, when he told her to stop the blood: that she did stop the blood

and told him she thought he would recover and yet live longer than she would, and he replied, *"save me if you can."*

This witness also stated, that she thought the deceased thought he would not die from the wound, but the Court refused to consider the witness' opinion, as to what the deceased thought. This witness also said, the last words she heard the deceased say, were, "Save me Wilson if you can:" that the appeal was made to Wilson Tilghman, his brother, who was present She further said, that the deceased seemed addled like a drunken man: that he spoke very indistinctly, sometimes talking rationally and at other times foolishly.

The prisoner called Wilson Tilghman upon this part of the case, who testified, that he was brother to the deceased and father to the prisoner: that he was at the house of the deceased on the fifteenth of August last, just before his death: that he did not believe the deceased thought he would die: heard him say, "save me Wilson if you can."

This witness also stated, that the deceased seemed addled and spoke indistinctly, saying some things intelligibly and others foolishly.

The prisoner's counsel still objected to the admission of the declarations of the deceased, for the reason, that his request of the witnesses, to save him if they could, manifested hope on his part, that he would still recover, and a belief that it was possible for him to survive. And that, even though he had entertained the opinion at one time, that he would die from the effects of the wounds, yet he subsequently changed that opinion and entertained hopes of recovery; and that any declaration made, while laboring under the first impression, would not be admissible, in consequence of such subsequent change of opinion and hopes of recovery; and that the expression referred

to, "save me if you can," was evidence, that the deceased had changed his opinion that he would die from the effects of the wounds, if he had before entertained such opinion; and that the declarations were inadmissible for the further reason, that the deceased was *non compos mentis* and insane at the time they were made.

The Court concurred with the prisoner's counsel in the correctness of the legal positions assumed, but expressed the opinion, that the deceased did entertain the opinion that he would soon die from the effects of the wounds, and so expressed himself; and that it did not appear from the testimony, that he had subsequently changed that opinion; and that the exclamation, "save me if you can," rather manifested a desire to live, than a hope that he would recover: that the nature of the wounds was calculated to confirm the deceased in the opinion, that he would necessarily die from their effects in a short time; and that it did not appear from the evidence, that the deceased was insane in his last moments, but it did appear that he was rational and sensible of his situation.

The evidence proposed was therefore admitted.

The Solicitor then continued the examination of the first witness, Wilson, who further testified, that, when he reached the house of the deceased, as set forth in the other part of his testimony, he found him bleeding and wounded as described: that witness asked the deceased, if he knew who had given him the wounds, and he replied that he did: that the witness then asked who it was and he said it was John Tilghman, the prisoner at the bar: that the witness also asked him, if he had been shot, to which he replied, "if he had been, he did not hear the report of the gun; that he heard something pop like a percussion cap:" that the witness did not remain to have further conversation, but proceeded to Kinston after a physician.

William Wingate was then called as a witness by the State, who testified, that he saw the deceased at his own house after he had received the wounds spoken of and just before his death: that he was at the time engaged in a conversation with Wilson Tilghman, the witness heretofore called; that Wilson Tilghman asked the deceased, how the affair took place, and the deceased attempted to tell him, but his lips and tongue seemed to be stiff, and he so muttered his words, that he could not be understood by the witness; whereupon Wilson Tilghman told the deceased, how John Tilghman, the prisoner, said it took place, to which the deceased replied, "Not so, Wilson; John met me in the road and told me he had come on purpose to kill me." The witness said, he did not remember any of the statement of Wilson Tilghman, which brought forth this reply of the deceased.

The prisoner's counsel objected to the testimony, upon the ground, that the witness could not remember the substance of the statement of Wilson Tilghman, to which this negative of the deceased applied; and that it was but a part of the conversation. The Court overruled the objection and admitted the evidence.

This witness further stated, that subsequently to this conversation, he heard the deceased exclaim, "he has killed me."

Upon cross examination, this witness said, he saw the prisoner the same afternoon at Council Wooten's—he was lying down on the piazza and was bleeding; the blood had run through the bed and along the floor. He also saw the knife, exhibited in Court, picked up the same day, after he saw the prisoner at Wooten's. It was found in the road spoken of by the witness Wilson. There was blood upon it at the time, and blood in the road at different points.

In reply to a question asked by the prisoner's counsel, this witness said, he had told one Garby, that he would

for one hundred and fifty dollars leave the country and not appear as a witness against the prisoner: that this was said in reply to an offer make to him by the said Garby, who told him, that Wilson Tilghman, the father of the prisoner, said he did not want his (Wingate's) oath to hang his son, and that he would give him one hundred dollars to leave the country and not appear as a witness.

Dr. Woodley was again called to the stand, and described the wounds of the deceased to the jury, as he had done to the Court, when he was before examined, and gave the same opinion as to their effects. He also said, that he saw the prisoner soon after he saw the deceased and upon the same day; that he had a wound through the right hand near the thumb. It was made with a knife, which cut an artery and a nerve in passing through. Witness took up the artery some days after this time, and was compelled to take it up again at another place twelve days later. The knife entered on the inside of the hand and turned towards the brawn of the thumb. The prisoner would have died during the night had he not received medical aid.

Council Wooten was next called by the State, who testified, that he lived three or four hundred yards from the place in the road, where the wallet and blood were found as described by the witness Wilson: that he was at home on the fifteenth of August last in the afternoon, when he heard the report of the rifle gun proceeding from about the place where he afterwards saw the blood in the road: that in about five minutes or, perhaps, less after he heard the report of the gun, the prisoner at the bar came to his house with the rifle, exhibited in Court; he came from the direction, in which witness had heard the gun fire; the rifle had blood upon it at the time, and the barrel was bent: that prisoner had blood upon him, and was then bleeding profusely from a cut through the right hand: the rifle was the one claimed by the prisoner before this time,

and which he usually carried. It was a percussion lock and required to be sprung before the hammer of the lock would fall. The barrel was not bent, when the witness last saw it before this time. The witness then sent for Wilson Tilghman, the father of the prisoner, who came to the house of the witness and proceeded with him, Wingate, and another to the place where the blood was found in the road. They saw the blood as described by the witness, Wilson, and found lying upon the ground the knife, exhibited in Court. It had blood upon it, and is the same the witness saw the deceased have a short time before.

The Solicitor next called Carrol Jackson for the State, who testified, that in the month of July last, he was at the house of the deceased, when a controversy arose between two little girls about a broach of cotton: that the prisoner interposed, with some remarks, when the deceased seemed to get angry with the prisoner and threatened to kill him. The prisoner told him not to do it sneakingly, but to go out with him and have a fair fight. The prisoner then took down his rifle, wiped it out and loaded it, and told the deceased to take his double barrel gun, and go out with him and take a fair fight with these weapons; to which the deceased replied that the prisoner might go where he pleased, but he, (the deceased) would not go with him. This witness also said, the deceased told him, the prisoner had been working at his house: that he saw the deceased's hat after the blows had been inflicted and it had no hole in it.

The Solicitor next introduced Mr. King; who said he saw the deceased on the morning after his death and that he had no marks of gunpowder about his face.

The prisoner then called as a witness one Cox, who said Joseph J. Tilghman died on Thursday, and on the Sunday before, the witness met him, when he said the prisoner had abused him in his own house and if he did

not mind he (the deceased) would kill him—that he had a great mind to kill him any how.

Mrs. Susan Tilghman, who had heretofore been introduced by the Solicitor upon a question to the Court, was now recalled by the prisoner, and cross examined as to the facts of the case. She said, the prisoner and deceased had a quarrel in July last—it grew out of a controversy between two little girls about a broach of cotton: that the deceased then threatened to kill the prisoner, who told him not to do it sneakingly, but openly—to take his double barrel gun and he (the prisoner) would take his rifle and with these weapons they would have a fair fight: that the deceased replied, "he was not ready then:" the deceased then said he would kill the prisoner if he did not let him alone: that the prisoner then threatened to tell his grandfather, and the father of the deceased, about certain notes the deceased held against him; and said, "you know you got the land for nothing you bought from grandfather:" that the deceased had, previous to this time, informed the witness and prisoner, that he had taken up several notes from Mr. John C. Washington upon his father, and he merely acted as his agent in the matter: that he (the deceased) still held the notes uncancelled, and intended to hold them against his father, as though he had purchased them from Mr Washington:—that he also had another note made payable to his father and signed by the deceased, with the word "Paid," marked across its face: that this note was of the same date and for the same amount as one his father then held on him for the purchase money of a tract of land; and that when the note, held by his father was presented for payment, he intended to offer this cancelled note to show, that the money for the land had been paid, it being the only debt of the kind he ever owed his father: that the five hundred dollar note in his possession was drawn to secure the purchase money of the land bought, but was not delivered,

because in it the word, "dollars," was spelt, "dolers;" and upon this being observed, that he (the deceased) executed another note for the land, and retained this.

The witness further said, that on the Sunday night before his death, she told the deceased she had heard the prisoner had told his grandfather about the notes and would make an affidavit of the facts, and she was afraid she would be called on to give evidence in the matter; to which the deceased replied, "he will have to swear soon if he does, for I intend to kill him before Saturday night." She also stated, that the prisoner and deceased had another quarrel just before his death, when deceased took down his gun, drew a load of small shot and reloaded it with large shot, and followed after the prisoner towards the woods: that he returned, and said he could not overtake the prisoner, and that if he had done so, he would have killed him: that, at another time, just before his death, the deceased hid his musket in his blacksmith shop, near his house, as he said, for the purpose of killing the prisoner; he said he did not want every person to see him carry his gun out. She also said, that the knife, exhibited in Court and spoken of by the witnesses, was the knife of the deceased: that the prisoner was at the house of the deceased on the same day the deceased received his wounds, and they seemed then to be friendly.

This witness also stated, that she was present when the conversation took place between Wilson Tilghman and the deceased, and that she did not hear the language used by the deceased, as stated by Wingate.

Wilson Tilghman was next called by the defence. He said he was the father of the prisoner: that on the fifteenth day of August past, in the afternoon, he went to the house of the witness Wooten, having been sent for by him: that he there found the prisoner, who had a fresh cut through the right hand, which was bleeding profusely: that the prisoner had then lost much blood and seem-

ed to be greatly exhausted: that the witness then went to the place in the road referred to by the other witnesses: that they picked up the knife exhibited in Court and it had blood upon it: that this place was about three hundred yards from Wooten's house, and that the intervening space was unobstructed, so that a child could be seen in Wooten's house door: that there was a scuffling place in the road between the wallet and puddle of blood, as marked by the road: that the witness walked from this place to the hog pen, spoken of by the witness, Wilson, in the space of two and a quarter minutes. This witness also said, he was at the house of the deceased the same afternoon just before his death: that he had a conversation with him, and did not hear him make the declarations deposed to by the witness Wingate: that this witness was there at the same time and during the entire time that Wingate was present. This witness also stated, that the deceased seemed addled like a drunken man—his speech was indistinct and thick—he muttered out his words and could not be distinctly understood in every thing he attempted to say.

Several witnesses were then called by the State and defence as to the character of Wilson Tilghman, whose testimony it is deemed unnecessary to report.

The Court, after reciting all the evidence offered in the case, charged the jury, that before they could convict the prisoner, they must be satisfied of the death of Joseph J. Tilghman: that he was killed by the prisoner, and that the act was done with malice aforethought either expressed or implied: that such malice did not mean simply ill-will or hatred; those passions might or might not characterize such malice as is charged in the bill of Indictment, and which is necessary to constitute the crime of murder: that, if they entertained the opinion from the testimony, that the prisoner, with a previously formed design and fixed will, and an actual and deliberate intention

to take away the life of the deceased, did kill him, then he would be guilty of murder, for this would be a killing with express malice: that, if they believed the prisoner killed the deceased with a deadly weapon, then the fact implied malice from the very fact of killing, and he would be guilty of murder, unless the inference of malice was repelled by evidence offered by the prisoner, or circumstances arising out of the evidence produced against him, or both combined; for, in such case the law would infer that he intended the natural consequences of his own act: that a rifle gun, such as described by the witnesses, is what is known in law as a deadly weapon, whether it be used by shooting a ball therefrom or by striking upon the head with either end of it. If the prisoner, having his rifle gun, sought the deceased with the design of provoking him into a fight, and when engaged in the affray of killing or doing him some great bodily harm, and under these circumstances did kill him, the prisoner would be guilty of murder.

Or if they should be of opinion, that the deceased gave to the prisoner a provocation by assaulting or striking him, and the prisoner retaliated with a weapon greatly more dangerous than the one used by the deceased, or with an excess of force, wholly inadequate to such provocation, then these were circumstances, from which they might infer a wicked, depraved and malignant spirit upon the part of the prisoner, amounting to malice, and by killing the deceased under such circumstances he would be guilty of murder. If the prisoner and deceased engaged in a mutual affray, and while so engaged, the prisoner killed him of passion, he would not be guilty of murder, but of manslaughter only, and this would be the case even though he killed him with his rifle or any other deadly weapon, for such would be a killing without malice; that if they believed the deceased made an assault upon the prisoner, that there was an actual necessity for the pri-

soner to kill the deceased in order to save his own life or prevent some great bodily harm to himself, and, under such circumstances, he killed the deceased, he would not be guilty of any offence, but excused in law; or even if there was an *apparent* necessity for him to kill the deceased in order to save his own life or to protect himself from some great bodily harm, he would not be guilty.—And by *apparent* necessity it is meant, that if, from the character of the weapon used by the deceased and from the manner of his assault, a person of ordinary fears and ordinary apprehensions would be induced to believe it necessary to kill in order to prevent death or some great bodily harm, then by killing the deceased, under such circumstances, the prisoner would not be guilty of any offence, but would be excused in law.

Here the charge of the Court closed; when the presiding Judge turned to the defendant's counsel and asked if they desired any other instructions from the Court to the jury. In reply to which, the defendant's counsel asked the Court to charge the jury, that if they entertained a reasonable doubt of the prisoner's guilt, they ought to acquit him. Upon which the Court informed the jury, that, before they could convict the prisoner, they should be satisfied beyond a reasonable doubt, that he killed the deceased; and that, if they should be satisfied beyond such doubt, that the prisoner killed the deceased and with a deadly weapon, then they ought to convict him, unless the prisoner convinced them by his own proofs or circumstances arising out of evidence offered by the State, that he killed in self defence, or that the killing was extenuated from murder to manslaughter; in which latter case they should find him guilty of manslaughter only; and if the killing thus appeared to be in self-defence, they should return a verdict of not guilty.

The Court again asked the Prosecuting Officer and counsel for the prisoner, if they desired to ask further

instructions to the jury; to which they replied, that they did not.

Whereupon the jury retired; and afterwards returned with a verdict, in which they found the prisoner guilty of murder.

The prisoner's counsel moved for and obtained a rule for a new trial:

1st. Because the Court admitted improper testimony against the prisoner, after objection.

2nd. Because the Court excluded proper testimony offered by the prisoner.

3rd. Because the Court gave erroneous instructions to the jury.

4th. Because the Court refused proper instructions prayed for.

5th. Because the Court, in summing up, omitted to tell the jury, they ought to disregard the dying declarations of the deceased, if they thought him insane at the time he made them.

6th. Because there was a separation of the jury and other irregularities practised by them, before they returned their verdict.

For these latter reasons the prisoner also contended that there was a mistrial and that he was entitled to a *venire de novo*. As to the alleged misconduct of the jury, while out and before their verdict was returned, many witnesses were examined, and the following facts appeared to the Court as satisfactorily proved.

The jury was placed in charge of an officer and was confined in the ordinary jury room in the third story of the Court-house in the Town of Newberne: That they retired from the Court on Thursday of the Term at six o'clock P. M. and rendered their verdict at 10 o'clock A. M. on the following Saturday. While out, the members of the jury separated at various times to obey calls of nature. Each one, so separated himself from the others

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more than once for this purpose, and one of them did so as often as six times. When they did this, they went one at a time under charge of an officer, and, during such absence, the other jurors remained together in the jury room with the door locked. They went about fifty yards from the Court House, and returned as soon as practicable, without holding intercourse with any one. And at one time one of the jurors went for the same purpose as far as one hundred and fifty yards from the other jurors. That one Elijah W. Ellis, a juror, separated himself from his fellows and visited a drug store at the distance of one hundred and fifty yards from the jury room. He was sick at the time and went to procure medicine, which he did, and returned without delay to the jury room. He went under the charge of an officer and held no conversation with any one except the keeper of the drug store, who asked him if they had agreed in their verdict, to which he replied, "*they had not.*" This drug store was in the most public place in the Town of Newberne.

It also appeared, that one Dewey, a juror, separated himself from his fellows and stood on the out side of the jury room, near the door closed, and conversed for ten or fifteen minutes with one Richardson, privately.

The subject of conversation did not appear to the Court.

The jurors also ate and drank while out, but not to excess. They did so with the permission of the Court a part of the time, and when enjoined by the Court not to eat or drink, they violated this injunction, contrary to the wishes of the officer, who had them in charge. Several jurors wrote notes and letters and dropped them from the windows of the room, in which they were confined. The contents and the names of the persons to whom these letters were directed, did not appear to the Court. It also appeared, that several jurors received letters from persons not upon the jury. The contents did not appear to the Court.

It farther appeared, that some of the jurors conversed from the windows of the jury room with persons in the street on various subjects and about this suit. What was said did not appear. It also appeared that negro servants and some small children of one of the jurors had access to the jury room. The servants entered for the purpose of carrying food and clothing to the jurors, and the children to see their father.

The Court expressed its disapprobation of the irregularities of the jury, but being satisfied, that they were generally men of high character, and that no undue influence was brought to bear upon them, but that these irregularities were the results of their long and unpleasant confinement, overruled this and other causes assigned for a new trial, and discharged the rule.

The Court, being further of opinion, that the separation and other irregularities of the jury did not vitiate the verdict, pronounced judgment of death upon the prisoner.

From which judgment, the prisoner prayed an appeal to the Supreme Court, which was granted.

Attorney General, for the State.

J W. Bryan, for the defendant, submitted the following argument:

In order to warrant the admission of dying or death bed declarations it must be shewn in the first place, that the declaration was made under an apprehension *of impending death*; and this seems to be the only instance in which such evidence is admissible against a prisoner, who has not had the power to cross examine—an anomaly, which in itself calls for great caution and circumspection in the use and application of such evidence. To enable these testimonies to be given in evidence, they must be made when the party is not only in actual danger of death, but when he is aware of the cir

cumstances in which he is placed and impressed with a sense of speedy dissolution. 1 *Chitty Com. Law* 569, 1 *Leach* 503, 1 *East P. C.* 353. But if at the time of making the declaration the party had reasonable prospects and hope of life, such declaration ought not to be received. *State* v. *Moody*, 2 Hay. R. 31. The case states that the wife of the deceased told the deceased, she thought if the blood could be stopped *he would recover yet*, when he told her to stop the blood—that she did stop the blood and told him, *she thought he would recover and yet live longer than she would*, and he replied "save me if you can." There is no evidence that any declaration, charging the prisoner with the commission of the act, was made by the deceased *before* this assurance was given him by his wife, that he would recover; on the contrary, all the declarations of the deceased to that effect, were made *afterwards*. Such declarations are not admissible in evidence. *Rex* v. *Mosely* 1 Moody Crim. cases 101. *Ib. Eng. Crown Cases* 101. In *Rex* v. *Crockett*, 19 Eng. Com. L. Rep. 418, a person who was told by the Surgeon, that she would never recover, said, that she "hoped he would do what he could for her for the sake of her family." He again told her that there was no chance of her recovery. Held that this shewed such a degree of hope in her mind, as to render a statement, she then made, inadmissible, as a declaration, *in articulo mortis*. And Bosanquet, Justice, before whom the case was tried, declared "this will not do, I must strike the whole of this evidence out of my notes." In *Rex* v. *Haywood*. 25 Eng C. L. R. 331, 6 *Carr and Payne*, 157, it is held that any hope of recovery, however slight, existing in the mind of the deceased, at the time of his making a declaration, will render it inadmissible as a declaration *in articulo mortis*. In *Rex* v. *Fagent* 7 Carr & Payne 238, 32 Eng. C. L. R. 501, if a person, whose death is the subject of a charge of manslaughter, express an opinion that she shall not recover,

and make a declaration, and at a subsequent part of the same day, asks a person whether he thinks she will "rise again." Held that this showed such a hope of recovery, as rendered the person's declaration inadmissible. 33 *Eng. C. L. R.* 168, 172. In *Christie's Case*, O. B. 1821, Carr Supp. C. L. 202, the deceased asked his Surgeon if the wound was necessarily mortal, and on being told that a recovery was just possible, and that there had been an instance, where a person had recovered from such a wound, replied, "I am satisfied," and after this made a statement; it was held by ABBOTT, C. J., and PARK, J., to be inadmissible as a declaration *in articulo mortis*, since it did not appear that the deceased thought himself at the point of death; for being told that the wound was not necessarily mortal, he might still have had a hope of recovery. *Roscoe's Crim. Ev.* 26. The mere fact that a person receiving his mortal wound, was heard to cry out, "O my people," is not alone sufficient evidence of the expectation of immediate death to authorize the admission of his declarations. *Lewis* v. *State*, 9 S. and M. 115. The twice repeated expression by the deceased, of "save me if you can," was held rather to manifest *a desire* to live, than a *hope* that he would recover—this distinction between *desire and hope* adopted, and recognized by the learned Judge, as the ground and inference, for the admissibility of this testimony, would seem to be one without much, if any difference, and would be but an increase of the harshness of the rule making such declarations evidence and aggravate the anomaly of its character. Who is there that has not felt in *desire*, what the wise man said of *hope*, (which is not much different from it,) that it being deferred maketh the heart sick, and that, still proportionable to the greatness of the desire. *Locke Hum. Understanding*, B. 11, C. 21. *Hope* is the encouragement given to *desire*. *Cogan on the Passions*, C. 2, S. 3 And *desire* is that sensation excited in the mind, by the view, or by the con-

templation of any desirable good, which is not in our possession, which we are solicitous to obtain, and of which the attainment *appears at least possible. Ib. Pt.* 1 C. 9, S. 3. The opinion too of the witness, as to the belief of the deceased that he would not die, was admissible. *McKee* v. *Nelson*, 4 Cow 355. 1 *Leach Cr. Law*, 503. 1 *East C. L.* 359, 360. *Trelawny* v. *Colman*, 2 Starkie R. 191.

2nd. Although, as a general rule, it is true, that it is the province of the Judge and not of the jury to determine whether the circumstances, under which the declarations were made, are admissible in evidence, yet the jury are to judge of them and of their weight, as of all other testimony, and ought so to have been instructed by the Court. The Court in this instance left nothing upon this part of the case to the jury, but determined both upon the admissibility and weight of the evidence, and the sanity of the deceased at the time the declarations were made. 1 *Greenleaf on Ev* 207. *Rex* v. *Woodcock*, 2 *Leach Cr. Cases*, 563. *Phil & Am on Ev.* 304. *Vass's Case*, 3 Leigh R 794. *Commonwealth* v. *Murray*, 2 Ashmead 41. *Commonwealth* v. *Williams*, 2 Ashmead 69. 1 *U. S. Digest Evid.* 694. See also the remarks of Mr. Evans, 2 *Poth. on Oblig.* 256, (294,) App. No. 16, who thinks that the jury should be directed previous to considering the effect of the evidence to determine—1st. Whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred; 2nd. Whether the inference, deduced from such circumstances or expressions is correct; 3rd. Whether the deceased did make the declarations alleged against the accused; and 4th. Whether those declarations are to be admitted, as sincere and accurate *Trant's case*, McNally's Ev. 385. *White* v. *White*, 4 Dev. R. 257. *Sneed* v. *Creath*, 1 Hawks R. 309.

3rd. This case discloses the facts that after the jury were charged and whilst they were deliberating upon their ver-

dict, they repeatedly separated from each other; one juror left the jury room and stood outside near the door, but with the door closed, and conversed for ten or fifteen minutes with a stranger; the jury ate and drank with the permission of the Court a part of the time, and when enjoined by the Court not to do so, violated this injunction contrary to the wishes of the officer, who had them in charge; a correspondence by means of letters was had and kept up by and between the jurors and persons out of doors not members of the jury; conversations were also had and held from the windows of the jury room, with persons in the street, on various subjects and about this suit, and servants and children were admitted into the jury room.

After the evidence has been heard and the jury retire to consider of their verdict, the oath administered to the officer, who is sworn to keep them, is as follows: You shall swear that you shall keep this jury without meat, drink, fire or candles; you shall suffer none to speak to them, neither shall you speak to them yourself (not adding the words, touching any matter relative to this trial, as in 6 T. R. 530–1, *et supra.*) but only to ask them, whether they are agreed. So help you God. *Dalt. c.* 185; 2 *Hale* 296; *Dick, Sess.* 223; *Bac. Ab. Juries, G.*, 1 Chitty C. L. 632. Accordingly in *Com. Dig. tit. Enquest F.*, it is laid down, that after the evidence given, the jury ought to continue together till they agree on their verdict, without eating, drinking, fire or candle, or speaking with any one, except the bailiff to know if they be agreed. *Co. Litt.* 227, B. 3. *Just.* 29, pl. 13. 15 *Hen.* 7, 1, 2. If a great tempest happens, the jury may depart from the place, where they are to consider of their verdict. So if a sudden affray happens, or if the house be upon the point of falling. *Vin Ab tit. Trial G.*; 4 *Cites Bro. Verdict pl.* 19; 14 *Hen.* 7, 29; *Per Rede, Davers & Tremaile Bro. Jurors pl* 13 S. C. The same law seems to be of fire

upon the house. *Ib. Vin. Ab. Trial* (G. g 4.) So in *Comyn's Dig. tit. Enquest F.*; if the jury separate on account of a great tempest, they shall not be amerced. (*Plowd.* 13 b. 15 *Hen* 7, 1 b. 14 *Hen.* 7, 30.) In 4 *Blac. Com.* 360, it is said that when the evidence on both sides is closed, and indeed when any evidence is given, the jury cannot be discharged unless in cases of evident necessity; (*Co. Litt.* 227 3 *Just.* 110. *Fost.* 27. *Gould's case*, Hill 1764) till they have given in their verdict, but are to consider of it, and deliver it in, with the same forms, as upon civil cases, only, they cannot, in a criminal case, which touches life, or member, give a privy verdict. But the Judges may adjourn, while the jury are withdrawn to confer, and return to receive the verdict in open Court.—In *Bul. ni. pri.* 308, it is said, an officer of the Court ought always to be placed at the door of the box, where the jury sit, to prevent any one from having communication with them: and when they depart from the bar, they are to be attended by a bailiff, sworn for that purpose. In the *King* v. *Wolf et. al.*, 1 Chitty's Rep. 401, which was an *indictment for a conspiracy*, Cor. ABBOTT, C. J., the trial being unfinished the first day, Abbott informed the jury that they might retire at night to their families, but warned them not to have any communication with any person, touching, or concerning the matter in issue. They retired accordingly, and the next morning they assembled again and the case being concluded, on that day, they found the defendants guilty. The defendants and their attornies were ignorant of such separation and retirement, until after they had formed their verdict. On motion to set aside this verdict, the cases were fully gone into by four counsel for the defendants; and they cited Lord *Delawere's case*, 4 Harg. Lt. Tr. 232, 1 Jac. 2, A. D. 168, and Kelyng 56, where it is said by all the Judges (on a question whether the Court could allow the jury to separate,) "the jury being once charged, can never be dis-

charged, till they have found their verdict; this is clear; and the reason of that is, for fear of corruption and tampering with the jury. An officer is sworn to keep the jury, without permitting them to separate, or any one to converse with them, for no man knows what may happen; for though the law requires honest men should be returned upon juries, and without a known objection, they are presumed to be *probi et legales homines*; yet they are weak men, and perhaps may be wrought upon by undue influence." The Judges were unanimous in refusing the rule and delivered their opinions *seriatim*. ABBOTT, C. J., saying, I am of opinion that in case of a *misdemeanor*, then dispersion does not vitiate the verdict. In the case of the *King* v. *Stone*, A. D. 1796, 6 T. R. 530, which was an indictment for high treason, the Court having set on the first day of the trial, from nine o'clock in the morning, till ten o'clock at night, without any intervention or refreshment, and the Attorney General stating that his evidence would occupy four hours more, and some of the jury being very much exhausted, and incapable, as they declared, of keeping up their attention much longer, the Court adjourned till nine o'clock the next morning. Lord KENYON observing that necessity justified what it compelled; and though it was left to modern times, to bring forward cases of such extraordinary length, yet no rule could compel the Court to continue their setting longer than their natural powers would enable them, to do the business of it. The jury retired to an adjoining tavern, where accommodations were prepared for them, and the bailiffs were sworn "well and truly to keep the jury, and neither to speak to them themselves, nor suffer any other person to speak to them, touching any matter relative to this trial." The entry of the adjournment was in the following form:—Thursday next after, &c. Forasmuch as it appears to the Court here, from the length of time, which has already been occupied by the trial of the issue joined upon this

indictment, and the further time which will be necessarily occupied by the same, that justice cannot be done, if this Court proceed without intermission upon the said trial: It is ordered that the jury empannelled and sworn to try the said issue, have leave to withdraw from the bar of this Court, being well and truly kept by six bailiffs, duly sworn not to permit any person to speak to them touching any matter relative to the trial of this issue, and that the same jury shall again come to the bar of this Court, on the morrow, at nine o'clock in the forenoon. And it is further ordered that the prisoner be again brought, &c.— In *Bro Ab. tit. Verd.* 17, 24 Ed. 3, 24, the jury were sworn and committed to the care of the sheriff, and when the justices would have taken the verdict, certain persons deposed, that victuals and drink were brought to the jury, after their charge, and that they were suffered to go out, for which reasons the justices refused to take their verdict, because it was suspicious; and complaint was made of this to the King, by bill, which he indorsed to the justices of *Banco Regis*, to do right and reason, and the under-sheriff by his servant, confessed that he permitted them to go at large, and because this appeared of record, as his misdemeanor, and he was an officer, a capias was awarded against him; and because their going at large, and victuals and drink being carried to them, was only a surmise, a *venire facias* was awarded against the jury and the trespassers, and between the parties, a *venire facias de novo* was awarded. Where there has been an improper separation during the trial, if the verdict is against the prisoner, he is entitled to the benefit of a presumption, that the irregularity has been prejudicial to him; and the burthen of proof is upon the government to shew beyond a reasonable doubt, that the prisoner has suffered no injury, by reason of the separation. If the government fails in this, the verdict will be set aside. *State* v. *Rescott*, 7 N. Hamp. 287; where a

part of a jury in a capital case, which lasted several days, frequently separated themselves from their fellow jurors at night, for fifteen or twenty minutes at a time, without being under charge of an officer, it was held that this was such an irregularity as vitiated their verdict. And it is not necessary for the prisoner in such case, to prove that the jurors have been tampered with—it is sufficient if they might have been. *McLain* v. *State*, 10 Yerger, 241. In *McLean* v. *The State* it is held that in capital cases, the jury after being sworn, should not be permitted to separate, until they have renderd their verdict, and if permitted so to separate, the judgment will be reversed. 8 *Mis.* 153.

In *Smith* v. *Thompson*, 1 Cowen R. 221; Where two Jurors (after the jury retired to consider of the verdict) separated from their fellows, and were gone some hours, but returned, and joined in the verdict, the Court refused to set aside the verdict, *there appearing to have been no probability of abuse.* In *Horton* v. *Horton*, 2 Cowen R. 589, the jury agreed upon their verdict, while the Court were at dinner, and without the consent, or knowledge of either party, dispersed, and obtained their own dinners and returned into Court at the opening thereof, and upon a motion to set aside the verdict, it was *held that if the slightest suspicion had appeared* that the privilege which the jury had taken, had been abused to the injury of the party the verdict should be set aside, but none such was shown or was insinuated. In the *People* v. *Douglass*, 4 Cowens R. 26, a jury impannelled to try a prisoner, upon an indictment for murder, were allowed to leave the Court House, during the trial, under the charge of two constables; and having left the Court-House, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some of them on their return, and drank spirituous liquors, though not enough to affect them in the least, and one of them con-

versed on the subject of the trial; they returned, heard the trial through, and joined in a verdict of guilty. Held, that the verdict should be set aside, and a new trial granted. And although the mere separation of the jury contrary to the directions of the Court will not of itself be a sufficient cause for setting aside the verdict, yet if there be the least suspicion of abuse, the verdict should be set aside; et vide *Jarnagan* v. *State*, 10, Yerger 539. So when a juror, after the cause was committed to the jury, drank brandy, though in a trifling quantity and as he stated to cure the *diarrhea*, it was held that the verdict should be set aside, *Brant* v. *Fowler*, 7 Cowen R. 562. And in this case the Court observed: "We cannot allow jurors thus of their own head, to drink spirituous liquor, while engaged in the course of a cause. We are satisfied, that here has been no mischief; but the rule is absolute, and does not meddle with consequences. Nor should exceptions be multiplied. We have set aside verdicts on error, for this cause, even where the parties consented that the jury should drink." So where the jury procured their separation, by pretending to the constable that they had agreed upon a sealed verdict, when in truth they had not; and conversations out of doors were afterwards carried on in the presence of some of them, relative to the suit, by persons not on the jury; and on assembling, they were sent out again, though this was objected to by the plaintiff; and then they returned with a verdict for the defendant; it was held that the verdict should be set aside. *Oliver* v. *Trustees of Springfield*, 5 Cowen R. 283. In *Beebee* v. *The People*, 5 Hill's R. 32, which was an indictment *for maliciously maiming a horse*, in the course of the trial the prosecutor having failed to procure the attendance of one Dutton, whose deposition had been taken before the committing magistrate, it was proposed by the prisoner's counsel to admit the deposition to be read in evidence, provided time were allowed him to obtain wit-

nesses, in order to shew Dutton's incompetency, for want of religious belief. This was agreed to by the prosecutor, and the trial was accordingly suspended for three days. In the meantime the jury were allowed to separate, having been previously admonished by the Court, however, not to converse with any one in relation to the case. At the expiration of three days, the Court and jury convened, and the trial proceeded. NELSON, C. J., in delivering the opinion of the Court, remarks, "in respect of the delay of the trial and separation of the jury in the meantime, it is not for the prisoner to take advantage of the irregularity, if it be such, as the indulgence was granted on his application, and for his benefit. Still, if it had appeared that any of the jurymen, while thus separated, were tampered with, *had held improper conversation in respect to the complaint, or in any way misbehaved themselves*, or abused the indulgence of the Court, we should feel it our duty to interfere and quash the proceedings. But I do not find the slightest imputation against them. For aught that appears they observed strictly the admonition of the Court to *hold no conversation during the interim* about the complaint." In the important case of the *Commonwealth* v. *John McCaul*, Virginia Cases 271, the prisoner was indicted for *grand larceny*, and the trial continued four days; on each of which the Court adjourned for about two hours, giving orders, that in the meantime, the jury should be kept together, in a room by themselves, where they were allowed refreshments. On their way to the jury room, at the second adjournment, one of the jurors having been unexpectedly sworn on the jury, separated from his fellows for about twenty minutes, to attend to some necessary business. His pretence was that he wished to dine at home; his departure was opposed by the sheriff, who admonished him not to do so, and took hold of his arm to prevent him. The juror stated that he believed the Court at that time did not instruct the jury

to remain together; and he understood the design of the adjournment was with the view, that the jury might obtain some refreshment. He ate his dinner at his boarding house and returned. Several persons asked him if the trial of McCaul had ended, to which he answered in the negative, but he had (as he stated) no further conversations with any one on the subject of the trial; denied that he had been practised with, and no abuse appeared. Another juryman was absent a few minutes, on a visit to a sick child, (this was the morning of the second day of the trial) with an officer, from whom he was separated about five minutes, on going in his chamber to see his child. Verdict of guilty. On moving to set aside this verdict, Mr. *Wirt*, for the prisoner, defied the Attorney General to produce a single case of life and death, in which a verdict was allowed to stand, after a separation of the jury. And Mr. *Nicholas*, the Attorney General, said that Mr. *Wirt* could not produce a single case from the English books, in which the separation of one juryman from his fellows was sufficient to set aside the verdict. A majority of the Court were of opinion that actual tampering, or conversation on the subject of the trial with a juryman was not necessary to set aside the verdict. And per Nelson, J., (who delivered the opinion of the Court) "from the mode in which collusion and tampering is generally carried on, such circumstance is generally known to no person, except the one tampering, and the person tampered with, or the persons between whom a conversation may be held, which might influence the verdict. If you question either of these persons on the subject he must criminate, or declare himself innocent, and you lay before him an inducement not to give correct testimony. The old rule was that the jury on no occasion, should separate. I mentioned (though it was with difficulty that the rule has been at all relaxed) that it is relaxed only in cases of imperious, or perhaps of unavoidable necessity. But by

allowing that a jury may separate without necessity and that their verdict should stand, unless the party accused, who, in these cases is in the custody of law, can shew that the jury not only have separated, but that they, or a member of it, has also been tampered with, or held communication on the subject; this great barrier against oppression may gradually be sapped and undermined, and the bulwark cannot long remain. Such a precedent would be productive of evils incalculable, and too great for the Court, by its decision, to allow a door to be opened for them. Every danger, and particularly in such a case as this, should be watched and opposed in the beginning.—The Court will preserve "with fear and jealousy," and will not expose the trial by jury in criminal cases, to such risks of contamination, as arises from the affidavits in this case. If the Court hath without necessity, suffered a juryman to go home without an officer (which it would never do) it would vitiate the verdict. There is as much danger from a juryman's separating, without the act of Court, as if it had been done by such act. Although there might, and probably was, no tampering with any juryman in this case, yet in a free country, in deciding in a particular case, the decision is to be according to general principles as applied to that case; and more good will arise from preserving the sacred principle, involved in this case, than evil from granting a new trial, although in this individual instance, a verdict has probably been given by twelve men in fact, unbiased by the separation." And Chief Justice Shaw, in the case of the *Commonwealth* v. *Roby*, 12 Pickering R. 510, commenting upon this (McCaul's) case, remarks, that "it is manifest that by such separation, the jurors might be thus exposed," and in his review of the authorities upon this subject, concludes his very able opinion with the remark: "The result of the authorities is, that where there is any irregularity which may affect *the impartiality of the proceedings*, as when

meat and drink have been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have *improperly separated themselves*, or have had communications not authorized: then inasmuch as there can be no certainty, *that the verdict has not been improperly influenced*, the proper and appropriate mode of correction and relief is by *undoing*, what is thus improperly and may be, *corruptly done*—or where the irregularity consists in doing that, which may disqualify the jurors for proper deliberation, and exercise of their reason and judgment, *as where ardent spirits are introduced*; there it would be proper to set aside the verdict, because no reliance can be placed on its purity and correctness." In *Carstapher's* case, 2 Hay. R. 238, which was an indictment *for perjury*, the Judge retired for a few minutes, and two of the jurors also retired, without leave, and without an officer, and returned again. The jury found the prisoner guilty; and upon a motion to set the verdict aside, it was held per HALL, J., "If it shall appear upon the affidavit of the jurors, *that they did not speak with any person in their absence*, the verdict ought not to be set aside." And this afterwards appearing, the motion was not further pressed. It would seem that if the contrary had appeared, the learned Judge would have deemed it sufficient cause, to set aside the verdict; and per GASTON, J., in *Miller's* case, 1 Dev. & Bat. 528, "I believe I may lay it down *as an universal rule*, that there is *no* instance in England, either in ancient or modern times, in which such a dispersion (of the jury) is permitted, on a trial for a capital offence, and for that very reason it follows, that such a dispersion must yet be deemed unlawful;" and per WASHINGTON, J., in the *U. States* v. *Haskell & Francois*, 4 Wash. Cr. Ct. Rep. 402, during a trial for a capital offence, the jury, after the adjournment from day to day, *previous to the charge*, may take refreshments, *but not afterwards*.—Whilst these decisions embrace the leading authorities,

both in this Country and in England, they would seem not to be entirely in accordance with that of the *State* v. *Miller*, 1 Dev. & Bat. 500, in this Court. In that case it was assumed, that upon the coming into Court of the jury, who had been permitted to retire in charge of an officer, upon the closing of the testimony and before the charge of the Judge, only eleven of the body appeared, but in less than two minutes, the other juror, whose name was third upon the list, and who did not answer when called, returned into the Court House, and the Court refusing to grant a new trial on account of this dispersion of the jury, the prisoner offered to prove, that while this juror was thus absent from the body of the jury, he went to a store at the distance of one hundred, or one hundred and twenty yards from the Court House, and in view of it, to get a drink of spirits; this evidence the Court below refused to receive and the jury having found the prisoner guilty, judgment of death was pronounced upon the prisoner.—The absent juror stated that when he separated himself from the jury, he was obliged to step aside to obey a call of nature, and it was in proof that the place to which he went was about seventy or eighty yards from the Court House, but was out of the way and retired. This Court, then constituted of RUFFIN, C. J., DANIEL and GASTON, Judges, differed essentially in opinion, but mainly upon the legal effect and operation of the separation of a jury in a capital case—the two former holding misconduct in a juror in a capital case, as a separation from his fellows, or eating or drinking without the permission of the Court, before delivering their verdict, to be a reason for applying to the *discretion* of the Judge in the Court below for a *new trial*, and not to render the verdict a nullity, and a *venire de novo* proper—and the latter, that any unauthorized and unexplained separation of a jury from his fellows, in a capital case, *in law* vitiates the verdict, and a *venire de novo* should be awarded. *Minor irregulari-*

ties are ground for a *new trial* addressed to the *discretion* of the Judge, who presided at the trial. Whilst it is always with diffidence and distrust that counsel press upon the Judges a review of their opinions, it cannot but afford them pleasure, to have an opportunity critically to re-examine the grounds by which they "have come to judgment."

It is true, that *new trials* are within the discretion of the Judge, but this discretion means, not the whim of a Judge but a *legal discretion;* it is his duty *discernere per legem quid sit justum*, and there must be a *legal rule*, for the government of this discretion, otherwise *jus est vagum*. The discretion of a Judge is said to be the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion, to which human nature is liable. The discretion, therefore, to give assurance of certainty and integrity in the administration of justice, must be a legal discretion, regulated by known and fixed rules and principles. And of this opinion was Lord Mansfield in *Crisp* v. *Eynon* 1 Burr. 300, where he adopts this principle, and in support of his judgment cites the quaint case of *Wood* v. *Gunston*, Michaelmas 1655, Banc. Sup. Style 466, which was an action on the case for speaking slanderous words, and upon a verdict for the plaintiff the defendant having moved for a new trial, GLYNN, Chief Justice said. "It was in the discretion of the Court, in some cases to grant a new trial, but this must be a *judicial discretion*, and not an *arbitrary discretion*. And it is frequent in our books for the Court to take notice of the *miscarriages* of juries and grant new trials upon them. And it is for the people's benefit that it should be so: for a jury may sometimes, by indirect dealings, be moved to side with one party and not to be indifferent betwixt them, but it cannot be so intended of the Court." And in the

same case Mr. Justice Denison concurred, and said it would be difficult perhaps to fix an absolutely general rule about granting new trials, without making so many exceptions to it, as might rather tend to darken the matter than to explain it; but the granting a new trial, or refusing it, must depend upon the *legal discretion* of the Court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice. Mr. Justice Foster also remarked, that the question "depending on a variety of circumstances, is matter of legal discretion." And it would seem that in this Court the same doctrine would be held, *State Bank* v. *Hunter*, 1 Dev 100. If attaints and the doctrine of mistrials furnished in the earlier history of law the only method of redress, and they have been succeeded by the modern practice of granting new trials, as affording a readier, and easer, and more just method of redress, that fact of itself furnishes, a conclusive reason, why, in criminal trials especially, the authority of granting a new trial should be kept and exercised, under positive rules of law, and not left under the patronage and uncertain discretion of its ministers. The writ of attaint lieth to inquire whether a jury of twelve men gave a false verdict; Finch 484. And a jury may be attainted in two ways—1st. where they find contrary evidence; 2nd. where they find out of the *compass of the allegata*. But to attaint them for finding contrary to evidence, is not easy, because they may have evdence of their own conusance of the matter by them, or they may find upon distrust of the witnesses, or their own proper knowedge; but if they find upon evidence, that does not prove the *allegata*, there it is easy to subject them to an attaint, because it is manifest, that what is so found, is an evidence not corresponding to their issue; and this was the only curb they had over the jurors: for the Judge being the best master of the *allegata*, if they did not follow his direction, touching the

proof, they were then liable to the danger of an attaint: and therefore since the Judges from the difficulty of attainting the jury, have granted new trials, whereby jurors having been freed from the fear of *attaints, they have taken a great liberty in giving verdicts.* *Gilb. H. C. B.* 128. And even if the verdict be notoriously wrong and find the prisoner guilty, it could only be set aside by attaint of the *King*, but not at the suit of the *prisoner.* 2 *Hal. P. C.* 310. 4 *Bl. Com.* 361. Formerly *the only* remedy for the reversal of a verdict unduly given, was by writ of *attaint*, which is at least as old as the institution of the grand assise by *Hen. II*, in lieu of the *Norman* trial by battel, but this is now abolished by 6 *Geo. IV, c.* 50. A mistrial on the other hand, is an erroneous trial on account of some defect in the persons trying, as if the jury come from the wrong County; or because there was no issue formed, as if no plea be entered: or some other defect of jurisdiction. 3 *Cro* 284. *Hob* 5. 2 *M. & S.* 270. Both of these remedies would seem to be applicable to breaches of those positive rules, which *the law* has established, in order to establish a fair, unbiased and impartial trial. A *venire de novo* is as ancient as the law, when attaints were in use, and as the judgment in attaint was very severe and the punishment excessively hard, to avoid that severity, it was thought better to proceed in a milder way, and *new trials* were introduced. The more modern practice hath declared that the former must be for matters apparently on the record, and *is of right.* The latter may be for matter not appearing on the record, and is addressed to the discretion of the Court. The former is matter of error, and must be noticed by the appellate Court; the latter is *ordinarily* not matter of error, nor else, where examinable. In this case the conduct of the jury, as appears by the record, was a breach of those positive rules prescribed by the law, to secure a fair, unbiased and impartial trial, and the law therefore annuls and vacates

the verdict. And in *Miller's* case, 1 Dev. & Bat. 512, the Court declare that they do not contend, that there may not be flagrant cases of misconduct during the separation of the jury, which ought to annul their verdict. Every one sees and feels that there is something unusual and unprecedented in this proceeding—if not wrong. And as Mr. Justice BLACKSTONE remarks, "next to doing right, the great object in the administration of public justice, should be to give public satisfaction. If the *verdict* be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied, unless he had a prospect of reviewing it. Such doubts would with him be decisive; he would arraign the determination as manifest, and abhor a tribunal which he imagined had done him an injury without a possibility of redress." 3 *Blac. Com.* 391.

Dying declarations are excluded in evidence in this State, by the provisions of the seventh section of the Bill of Rights. "In all criminal prosecutions, every man has a right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony." If therefore the dying man be regarded as a witness, or accuser, the admissibility of his declarations precludes the possibility on the part of the accused, of confronting the accuser and witness with other testimony. The relaxation of the ancient rule of law denying to prisoners the right to have witnesses sworn in their behalf, and allowing them that privilege, is but an assertion of this principle which is secured to the citizen not only by our Bill of Rights, but also by the sixth article of the Amendments to the Constitution of the United States, which declares that "in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him."

PEARSON, J. We have considered the several questions presented by the case as made up by his Honor, and have come to the conclusion that there is no error.

The first exception is untenable. The condition of the deceased was such as to make his declarations, competent evidence, as "dying declarations." It is not necessary, that the person should be *in articulo mortis*, (the very act of dying;) it is sufficient if he be under the apprehension of impending dissolution; when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn, as if an oath had been administered. The evidence was competent. The degree of credit to which it was entitled, was a matter for the jury; it was liable to be impeached, like the testimony of a sworn witness; and the jury were at liberty to give it more or less weight, as from the conduct of the witness, and the attending circumstances, they might suppose him to be more or less *impressed* by the obligation of his oath or the solemnity of the condition in which he stood.

The second exception, because of the rejection of the opinion of the wife of the deceased, that "she thought, the deceased thought, he would not die from the wounds," is also untenable. A witness is allowed to give his opinion as to the sanity of one at the time he made his will: or as to the affection of a wife towards her husband, viz: whether she loved him or not; because a witness may have acquired a knowledge of the fact, from a thousand little circumstances accruing at different times which it is not possible to communicate; but the matter to which our attention is now directed is not of that character.—What the deceased thought of his condition, was to be judged of by the state of his wounds, and what he *then* and *there* said and did. These circumstances it was in the power of the witness to communicate to the Court; and the Judge did right, requiring her to do so, whereby he was enabled to form an opinion, instead of allowing

the witness to form one for him. Upon the third ground of exception, the prisoner has no right to complain. The Judge, perhaps, entered more largely into the discussion of the law of homicide, than the facts of the case called for, but he confined himself to the announcement of well settled principles, except in one instance; there he erred in favor of the prisoner. In this he held, that if the deceased at the time he first made his declaration, was in a condition to make the evidence competent, but afterwards got better for a short time, and *then* had hopes of recovery, this would make the prior declaration incompetent.—This cannot be law. We presume his Honor was misled by a misapprehension of *Rex* v. *Faquet*, 32 E. C. L. 501, where it is said, that a subsequent hope may reflect back to the time of a prior declaration, so as to show that the deceased was not *in fact* in a condition to make his declarations competent. But this falls very far short of supporting the position, that, if, at the prior date the deceased was *in fact* in a condition to make his declarations competent, a hope of recovery at a subsequent time would make that incompetent which was before competent.

The fourth exception has been fully considered in treating of the third.

The fifth exception, for an omission to charge, cannot be entertained, because the point was not made during the trial, and at the close of the charge, the counsel on both sides expressly stated, they desired no further instructions to the jury.

The last ground of exception, because of the irregularity and misconduct of the jury, is the only one upon which we have had much difficulty. Perhaps it would have been well, had his Honor in his discretion, set aside the verdict and given a new trial, as a rebuke to the jury and an assertion of the principle, that, trials must not only be *fair, but above suspicion*. This, however, was a matter of discretion, which we have no right to reverse. Our en-

quiry is, was the misconduct and irregularity such as to vitiate the verdict, to make it in law, null and void, and *no verdict?*

In the consideration of this question, we have had occasion to review *State* v. *Miller*, 1 Dev. & Bat. 500, and it seems to us, that the decisions of the Court and the distinction between cause for a new trial, which is a matter of discretion, and cause for a *mistrial*, which is a matter of law, is fully sustained by authority and by reason.—The eminent talent of Judge GASTON, in a long and laboured opinion, was exerted on the other side of the question But his argument fails in this; he does not give due weight to the fact, that, according to the modern practice, the presiding Judge, *in favorem vitae*, has a discretion to give the prisoner a new trial, when suspicion is put upon the conduct of the jury, and although evidently oppressed by the position, that if such irregularity works a *mistrial* so as to make no verdict, a prisoner acquitted may again be put on trial, he attempts to escape the conclusion by a denial of the truth of the position, which is not supported by authority or by any sufficient reason.

We wish not to be understood, as disclaiming a right to grant a *venire de novo*, when it is made to appear on the record, that there has not been a fair trial; on the contrary, we assert that right whether it is to be exercised *for* or *against* the prisoner. We take this plainposition: if the circumstances are such as merely to put suspicion on the verdict, by showing, not that *there was*, but that there might have been undue influence brought to bear on the jury, because there was opportunity and a chance for it—it is a matter within the discretion of the presiding Judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or of the prisoner, or if they be solicited and advised how their verdict should be, or if they have other evidence than that which was offered on

the trial, in all such cases, there has in contemplation of law been no trial; and this Court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner.

In the argument, the prisoner's counsel assumed the position, that dying declarations are excluded as evidence in our State, by the provision of the 7th sec. of the Bill of Rights: "In all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony." We do not feel the force of the argument. The witness who proved what the dying man said, may be confronted with "other testimony," and the case is exactly the same as that of a witness who proves that the prisoner executed a certain deed, or wrote a certain letter, whereupon the deed or the letter is received as evidence against him.—This section of the Bill of Rights was aimed at the old practice, by which prisoners were not allowed to have witnesses *sworn* on their behalf, and the testimony came altogether on the part of the crown. Our ancestors did not intend to deny the rule of evidence, as to dying declarations, but to assert that, in criminal prosecutions, prisoners ought to be allowed to have witnesses in their behalf, sworn and examined.

There is no error.

Per Curiam. Ordered to be certified accordingly.

THE STATE *vs.* ATLAS JOWERS.

Insolence from a free person of color to a white man will excuse a battery, in the same manner and to the same extent, as in the case of a slave.

Appeal from the Superior Court of Law of Anson County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

The defendant, a white man, was indicted for an affray with Bob Douglass, a free black man. The evidence was, that the defendant and Bob got into a quarrel, when the defendant asked Bob, why he had reported at a certain place that he, the defendant, had told a lie, to which Bob replied, because he had told one. Upon this the defendant struck Bob, and a fight ensued, in the course of which, Bob struck the defendant with the butt end of a wagon whip, and the latter knocked him down with the broken limb of a tree. The defendant's counsel contended, that the insulting language, used by the free negro, justified the blow which the defendant gave him, and that he afterwards used no more violence, than was necessary to protect him in the fight.

The presiding Judge charged, that, though the Courts have held, that insulting language, used by a slave, may justify a white man in striking him, yet the principle did not apply to the case of a free negro, stricken under similar circumstances, by a white man.

The defendant was convicted, and, judgment being pronounced against him, appealed.

Attorney General, for the State.
No counsel for the defendant.

Pearson, J. It is settled, that insolent language from a slave is equivalent to a blow by a white man, in its legal effect, as an excuse for a battery. If a blow is given by a white man, a return of it is excusable in self defence, to prevent a repetition of the injury; so, if a slave gives insolent language, a blow is excusable in self defence, being necessary to put a stop to his insolence.

The question presented to this case is, does the principle apply to free negroes? His Honor was of opinion that it did not. In this a majority of this Court believe there is error.

The same reasons, by which a blow from a white man upon a slave, is excusable on account of insolent language, apply to the case of a free negro, who is insolent. It is a maxim of the common law, where there is the same reason there is the same law

But it is suggested, that free negroes differ from slaves in this, they have a right to own property, and to make contracts, which necessarily must frequently give rise to a difference of opinion, and if a free negro disputes the accounts of a white man, it is insolence, and will excuse a battery.

It is unfortunate, that *this third class* exists in our society. All we can do is to make it accommodate itself to the permanent rights of free white men. What amounts to insolence is a question for the Court, and is the subject of review in the Court of supreme jurisdiction; this is some protection. But as compared with a slave how stands the case? If a slave is insolent, he may be

whipped by his master, or by order of a justice of the peace; but a free negro has no master to correct him, a justice of the peace cannot have him punished for insolence, it is not an indictable offence, and unless a white man, to whom insolence is given, has a right to put a stop to it, in an extra judicial way, there is no remedy for it. This would be insufferable. Hence we infer from the principles of the common law, that this extra judicial remedy is excusable, provided the words or acts of a free negro be in law insolent. Such a being as a slave *or* a free negro, did not exist when the ancient common law was in force. But the excellence of that "perfection of reason" consists in the fact, that it is flexible and its principles expand, so as to accommodate it to any new exigence or condition of society, like the bark of a tree, which opens and enlarges itself, according to the growth thereof, always maintaining its own uniformity and consistency.

Per Curiam. Judgment reversed and a *venire de novo*

COLUMBUS MILLS vs. P. B. WILLIAMS.

The legislature has the constitutional power to *repeal* an act establishing a County. It has the same power to consolidate, as to divide, Counties, the exercise of the power in both cases being upon considerations of public expediency.

The purpose of making all corporations is the *public good*. The only substantial difference between corporations is, that, in some cases, they are created by the *mere will* of the legislature, there being *no other party interested or concerned*, and these are subject at all times to be modified, changed or annulled.

Other corporations are the result of contract; the legislature, for the purpose of accomplishing a public good, chooses to do it by the instrumentality of a *second party*. These two parties make a *contract*; the legislature, in consideration of certain labor and outlay of money, conferring upon the party of the second part, the privilege of being a corporation, with certain powers and capacities. Being a *contract*, it cannot be modified, changed or annulled without the consent of both parties.

Counties, &c., belong to the first class; Rail Road and Turnpike Companies, &c., are instances of the second class.

Appeal from the Superior Court of Law of Rutherford County, at the Spring Term 1849, his Honor Judge Bailey presiding, to the Supreme Court at Morganton, and thence transferred, by an order of that Court, to the Supreme Court at Raleigh.

This was an action of trespass, *vi et armis*, for an assault and battery on the plaintiff's person, tried at Rutherford Spring Term 1849, upon the following facts, submitted to the Court for judgment, as a case agreed.

The General Assembly, at its session of 1846 and '7, passed an act establishing a County by the name of Polk,

out of certain portions of the Counties of Rutherford and Henderson. By virtue of that act and a supplemental act, passed at the same session, Courts, both County and Superior, were organized, and all County officers were appointed and elected, and entered upon the discharge of their duties as such.

The site for the County Town and Court House was selected, and a deed to the Chairman of the County Court was duly executed and delivered. At the general election for sheriff, in August, 1848, the defendant was duly elected sheriff of Polk County, for two years, next ensuing—entered into bond according to law, and was qualified as such and acted as sheriff of said County, and claimed the right to act as such, at the time of executing the writ, under which the arrest was made, which issued from the Superior Court of Rutherford, with the County seal attached, tested of the Fall Term 1848, and was directed to the Sheriff of Polk County. The writ was issued on the 1st day of April 1849, came to the defendant's hands on the 2nd day of that month, and it was immediately executed by arresting the plaintiff.

The said Act of Assembly was repealed at the Session of 1848.

It is further agreed that a majority of the people of Polk County were opposed to the passage of the repealing act.

On the above statement of facts it is contended by the plaintiff, that the defendant, being no longer sheriff of Polk County, after the act went into operation which repealed the act establishing it, his arrest was not authorised, and, therefore, a trespass. On the other hand it is contended by the defendant, that the repealing act was unconstitutional and void, and therefore he was sheriff of Polk County, at the time of arresting the plaintiff, and well justified therein by virtue of the writ aforesaid.

And it was further agreed, that, if the repealing act be constitutional, there is to be judgment for the plaintiff for six pence and costs of suit; if otherwise, then the plaintiff is to have judgment of non suit. And his Honor being of opinion that the repealing act was constitutional, gave judgment against the defendant, accordingly, for six pence and costs, from which the defendant prays an appeal to the Supreme Court, which is granted.

R. F. Moore, for the plaintiff.

N. W. Woodfin and Bynum, for the defendant.

PEARSON, J. In 1816, the Legislature established a County by the name of "Polk." In pursuance thereof justices of the peace were appointed, Courts organized, and a sheriff and other County officers elected, who entered upon the discharge of the duties of their respective officers. In 1848 the act of 1846 was repealed, and the question is presented, has the legislature a right, under the Constitution, to repeal an act, by which a County is established?

From the formation of our State government, the General Assembly has, from time to time, changed the limits of Counties, and has, over and over again, made two Counties out of one, so that, in many instances, even the name of the old County has been lost; and it would seem to an unsophisticated mind, that, where there is the power to make two out of one, there must be the corresponding power to make one out of two. In other words, as the legislature has, undoubtedly, the power to divide Counties, where they are too large, that there is the same power to unite them, when they are too small: The power in both cases being derived from the fact, that by the Constitution "all legislative power is vested in the General Assembly," which necessarily embraces the right to divide the State into Counties of convenient size, for the

good government of the whole. Political and other collateral considerations are apt to connect themselves with the subject of corporations, and thereby give to it more importance than it deserves as a *dry question of law;* and the unusual amount of labor and learning, bestowed on it, has tended to mystify rather than elucidate the subject. Divested of this mystery, and measured in its naked proportions, a corporation is an artificial body, possessing such powers, and having such capacities, as may be given to it by its maker. The purpose in making all corporations, is the accomplishment of some *public good.* Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefitted, it is no more lawful to confer "exclusive rights and privileges" upon an artifical body, than upon a private citizen.

The substantial distinction is this: some corporations are created by the *mere will* of the legislature, there being *no other party interested or concerned.* To this body a portion of the power of the legislature is delegated to be exercised for the public good, and subject at all times to be modified, changed, or annulled.

Other corporations are the result of contract. The legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party.* These two parties make a *contract.* The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. *It is a contract;* and, therefore, cannot be modified, changed, or annulled without the consent of both parties.

So, corporations are either such as are independent of all contract, or such as are the fruit and direct result of a contract.

The division of the State into Counties is an instance of the former. There is no contract—no *second party*, but the sovereign, for the better government and management of the whole, chooses to make the division in the same way, that a farmer divides his plantation off into fields and makes cross fences, where he chooses. The sovereign has the same right to change the limits of Counties, and to make them smaller or larger by putting two into one, or one into two, as the farmer has to change his fields; because it is an affair of his own, and there is no *second* party, having a direct interest.

A rail road is an instance of the latter—certain individuals propose to advance capital, and make a road by which it is supposed, the public are to be benefitted, in consideration that the legislature will incorporate them into a company with certain privileges. The bargain is struck: neither party has a right to modify, change, annul, or *repeal* the charter without the consent of the other; and, (still to borrow an illustration from the farmer,) he has in this case *leased* out his fields at a *certain rent*, and has no right to make one larger and another smaller, without the consent of his tenant.

Roads furnish another familiar illustration. The County Court has a public road laid out, and an overseer and hands appointed. It may be altered or discontinued by the County authorities, and the overseer and hands have no direct interest or right to be heard in the matter, except as other citizens. But, if the legislature, instead of acting by its agent, the County authorities, choose to make a contract with certain individuals, that, if they will raise funds and make a road, they shall be incorporated with the right to exact tolls, &c., then the road can-

not be altered or discontinued without the consent of the corporation.

When a County is established, it is done at the mere will of the legislature, because, in its opinion, the public good will be thereby promoted. There is no *second party directly* interested or concerned. There is no contract, for no consideration moves from any one, and without a consideration, there cannot be a contract. The discharge of certain duties by the persons, who are appointed justices of the peace, or sheriff, clerk, or constable, can, in no sense of the word, be looked upon as a consideration for establishing the County. In legal parlance, the "consideration is past"—the thing is done, before their appointment. Some act for the honor of the station; others for the fees and perquisites of office, but their so doing did not form a consideration for the erection of the County, and is a mere incident to their relation as citizens of the County.

It was ingeniously argued, that, upon the erection of a County, certain rights attach by force of the Constitution, as the right to have at least one member in the House of Commons; and as these rights are conferred by the Constitution, it is insisted, that, having attached, it is not in the power of the Legislature to take them away.

The argument is based upon a fallacy. It is true, the Constitution invests every County with certain rights, as incident to its existence as a County. But, by no sound reasoning, can the incident be made to over-ride the principal; and the Constitution, by conferring these incidental rights, cannot be by any fair inference, made to interfere with the control of the Legislature on the subject of Counties, as instruments for the good government and management of the whole State.

The Constitution pre ordains these rights, but they are put expressly as incidents to the existence of Counties; and although they may very properly enter into the ques-

tion of expediency, they have no legislative bearing upon the power to create and abolish Counties, as may to the wisdom of the Legislature seem fit. Such statutes are not the result of contracts. There is no second party, who pays a consideration, which is the essence of every contract. *Terrett* v. *Taylor*, 9 Cranch 43. *Dartmouth College* v. *Woodward*, 4 Wheaton 663. *Phillips* v. *Bury* 2 T. R. 346.

PER CURIAM. Judgment affirmed.

FLETCHER ORMOND vs. WYATT MOYE.

When one is summoned as garnishee in an attachment, who owes a note which is negotiable; if he chooses to stand upon his rights, no judgment can be taken against him, without proof that the absconding debtor still holds the note, or had not assigned it, by endorsement before it was due, for, otherwise, it does not appear that he is indebted to the absconding debtor.

However it may be, as to notes payable on *demand*, whether or not they are considered over-due until demand made; it is certain that a note, payable "at sight" or "when presented," is not due until it is presented.

The case of *Myers* v. *Beeman*, 9 Ire. 118, cited and approved.

Appeal from the Superior Court of Law of Greene County, at the Fall Term 1850, his Honor Judge ELLIS presiding.

This was an action of debt. The plaintiff declared, as the indorsee of a promissory bond, of which the following is a copy: "$160. I promise to pay Benjamin C. D. Ea-

son or order, at any time after ten days from this date, when presented, one hundred and sixty dollars, value of him rec'd. April 24th, 1848." Signed, "Wyatt Moye," and sealed: Indorsed, "I transfer the within note to F. Ormond for being value received, May 29th, 1848." It was admitted that the indorsement should, in fact, have been dated on the 29th of June 1848. The defendant pleaded that there was no indorsement, and, specially, that he was summoned as garnishee by the Sheriff of Edgecombe County on the 1st day of May 1848, to appear before the Justices of the County Court of Edgecomb on the 4th Monday of May 1848, in a suit of attachment at the instance of Joshua Speight against B. C. D. Eason, and that on the said 4th Monday of May he filed his answer in the said cause, and pleads the proceedings in the said suit by attachment, the judgment therein and his satisfaction of the same. The defendant produced a copy of the record in the attachment suit, referred to in his plea, from which it appeared that the defendant stated in his garnishment, that on the 24th of May 1848, he executed his note to the said Eason for one hundred and sixty dollars payable ten days after date—that he knows nothing of the said note since it was executed—that the said Eason left his residence on the same day, as is reported and believed, and went out of the State, and has not since returned—that, knowing from the negotiable character of the said note, a good and unquestionable title to the same may be procured by indorsement, and that, if the same has been transferred before it became due, he may be compelled to pay the said note to the holder, when presented, he prays the Court for protection against such liability of double responsibility. It appeared further from the said transcript, that, upon this garnishment, judgment was subsequently rendered against Moye for the amount of the said note and interest; and it appeared by other evidence, that the judgment had been satisfied.

The defendant contended, and prayed the Court to instruct the jury;

1st. That, if they believed the testimony, the plea of the defendant was sustained, and the plaintiff could not recover on the issue.

2nd. That the bond declared on was over due and dishonored, at the time of its transfer to the plaintiff on the 29th of June 1848, and that it was subject, in the hands of the plaintiff, to all the defences, which would have been good against the payee; that the proceedings under the attachment of Speight operated to give to Speight a lien upon the sum, owing by the defendant upon the bond, either from the time of the service of the summons on the defendant, on the 1st of May 1848, or from the time of the defendant's answer as garnishee on the 4th Monday of May 1848; that, after that period, Eason could not transfer the bond, so as to give his transferee any better title than he had himself; and that the proceedings under the attachment would have been a defence to a suit by Eason, and were a defence to the suit of the plaintiff.

3rd. That, if any demand was necessary, after the expiration of ten days from the date of the bond declared on, in order that the bond, remaining unpaid, should be considered dishonored, the law would, or the jury might, infer a demand and refusal prior to the time of the indorsement, to-wit, the 29th of June 1848; and that the suing out of the attachment on the 27th of April 1848, and the notice to the defendant, as garnishee, on the 1st of May 1848, were equivalent in law to a demand and refusal.

4th. That the transfer to the plaintiff was not an indorsement and did not give him a legal title, so as to enable him to sue, as indorsee, in his own name.

The Court instructed the jury, that there was no evidence of a demand on the bond declared on, before the 29th of June 1848, and that it was not over due or dishonored, when transferred to the plaintiff on that day;

that the transfer to the plaintiff was a valid indorsement, and gave him the legal title of an indorsee; that, inasmuch as the bond was not due at the time of its indorsement, and the plaintiff was a *bona fide* indorsee, the proceedings under the attachment created no lien, and, if they believed the testimony, the plaintiff was entitled to a verdict in his favor.

The jury found a verdict for the plaintiff, and from the judgment thereon, the defendant appealed.

J. H. Bryan, for the plaintiff.
Rodman, for the defendant.

PEARSON, J. There is no error. The defendant upon his garnishment ought to have denied the fact of his indebtedness to Eason, unless it was first proved that Eason had not assigned the note before its maturity. It was his folly to submit to a judgment, by which the amount of the note was condemned in his hands, to the payment of the debt of the creditor in the attachment. This subject is fully explained in *Myers* v. *Beeman*, 9 Ire. 116, where one is summoned as garnishee, who owes a note which is *negotiable*; if he chooses to stand upon his rights, no judgment can be taken against him, without proof that the absconding debtor still holds the note, or had not assigned it, by endorsement before it was due; for otherwise it does not appear that he is indebted to the absconding debtor.

Assuming, that, as against the payee Eason, the satisfaction of the judgment upon the garnishment is sufficient, without its being done *on execution*, (which is required by the old cases,) the plaintiff, in this case, asserts and is entitled to, all the rights of an endorsee *before maturity*: if so, the note passed to him, subject only to *endorsed payments*.

There is some difference in the books upon this question of a note payable *on demand*, whether it is due presently, and therefore cannot be assigned, except as a note over due, until demand is formally made; but it is conceded in all the cases, that a note payable "at sight," or "when presented," is not due until it is presented, and so the note in question was transferred to the plaintiff before its maturity. In fact the defendant, in his garnishment, alleges the fact, that the note had never been presented for payment, and in his amended answer admits expressly, that the endorsement was made before the note had been presented, and of course before it was dishonored.

PER CURIAM. Judgment affirmed.

DOE ON DEMISE OF WILLIAM MOORE vs. MILLICENT EASON.

Parol evidence may be admitted to show a custom or usage of a place, where a contract is entered into, for the purpose of annexing incidents to, and explaining the meaning of terms used in it. But before the incident can be annexed, the contract itself, as made, must be proved. The incident cannot be used to establish the contract, nor can it be inconsistent with the terms of the contract.

Appeal from the Superior Court of Law of Pitt County, at the Fall Term 1849, his Honor Judge BATTLE presiding.

Rodman, for the plaintiff.

No counsel for the defendant.

NASH, J. This action in ejectment is to recover from the defendant a house and lot in the Town of Greenville, in the County of Pitt. The demise is laid on the first of January, 1849. The plaintiff claims, that the defendant entered into possession of the premises in 1848 as his tenant, and produced evidence tending to prove the fact to be so. In order to show, that the tenancy had expired at the date of the demise, set forth in the declaration, he offered to prove, that it was the general usage in the Town of Greenville for all leases to expire on the day next before the 1st of each January. This evidence was objected to, but was admitted by the Court. There was a verdict for the plaintiff and from the judgment thereon the defendant appealed.

The only question now presented is, as to the admissibility of this testimony, under the circumstances, under which it was offered. We must take the case as it is sent to us. There cannot be a doubt, that parol evidence may be admitted to show a custom or usage of a place where a contract is entered into, for the purpose of annexing incidents to and explaining the meaning of terms used in it. The leading case on the subject is that of *Hutton* v. *Warren*, 1 Mason and Welbsly, 466. In that case it was decided, that the plaintiff was at liberty to show a custom, by which a tenant, cultivating the premises, according to the course of good husbandry, was entitled on quitting to receive a reasonable allowance for seed and labor bestowed on the arable land in the last year of his tenancy, &c. The custom, however, is admissible in proof, not for the purpose of establishing the contract, but to add an *incident* not expressly embraced in it, and in reference to which the parties are presumed to have contracted. Thus, if the lease in this case was made on the 1st of February 1849, or from the 1st of January 1849, for and during that year, the plaintiff would be permitted to show, that by the usage or custom of Greenville, all

leases made within the town and so terminating, expired on the day preceding the 1st of January. In that case the custom would transport into the contract an incident, upon which it was silent, but with respect to which the parties must be presumed to have contracted. But before the incident can be so engrafted, the contract, as made, must be proved—the incident cannot be used to establish the contract. The expiration of a lease, is as much a matter of contract as its commencement; nor can the incident be inconsistent with the terms of this contract. In the case of *Wigglesworth* v. *Dollison*, Douglas 201, it was decided, that a custom, that a tenant, whether by parol or deed, shall have the way-going crop after the expiration of his term, is good, if not repugnant to the lease, by which he holds. See 1st *Smith's* leading cases 300, where the case of Dollison is also reported, and the notes. The contract of lease in this case may have been for one month, two months, or six months, and whether the custom was applicable or not, would depend upon the term agreed for.

We think the testimony under the circumstances of this case was improperly admitted, and there must be a *venire de novo*.

Per Curiam. Judgment reversed and *venire de novo* awarded.

THE STATE vs. JOHN SMALL.

If the weather is so bad, as to prevent an overseer of a road from working on the road, or to render unavailing any work he might do, he ought to be excused.

Appeal from the Superior Court of Law of Pasquotank County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

Attorney General for the State.
No counsel for the defendant.

NASH, J. The defendant is indicted, as an overseer of the road, set out in the indictment. It was not denied, that the road was out of order and not in such repair as the law required. The defence was, that, during the time specified, the weather was such, that it could not be worked. It was shown, that, during the winter of '49, '50, and up to the finding of the indictment, the defendant had worked the road five days, and that up to April the weather was very wet, but that the latter month was fair. The bill was found at the Spring Term 1850 of Pasquotank Superior Court, which commenced on the 22nd of April. The Court was requested to instruct the jury, that the defendant ought not to be convicted, because of the state of the weather, and if he had used due diligence. This was declined, but the jury were instructed, that where the law imposed a duty and its execution was prevented by the act of God, the party was excused. If, in this case, the weather was so bad as to prevent the de-

fendant from working on the road, or rendered unavailing any work he might have done, he ought not to be convicted. But, if they believed the witnesses, who testified to the state of the weather in the month of April, and of the road during that month, they ought to convict him. The jury found a verdict against the defendant, and from the judgment thereon he appealed.

We see nothing in the charge that is erroneous. Whether the facts testified to by the witnesses were true, was a proper enquiry for the jury—whether, if true, the defendant was excused or not, was a question for the Court.—And we concur in the opinion expressed. We have looked through the record and see no error, or sufficient cause to arrest the judgment.

PER CURIAM. Judgment affirmed.

THOMAS C. SMITH vs. DANIEL CAMERON.

An overseer is not strictly a bailee, though many of the principles of that relation and many of its duties attach to him. It is his duty to take such care of the property entrusted to him, as a man of ordinary prudence would take of his own property.

Appeal from the Superior Court of Law of Bladen County, at a Special Term in December 1850, his Honor Judge DICK presiding.

W. H. Haywood, for the plaintiff.

Strange, W. Winslow and D. Reid, for the defendant.

NASH, J. The action is in case, brought to recover from the defendant, who was the plaintiff's overseer, damages for the loss of a negro man, by the name of Israel, upon the allegation, that the defendant negligently and wrongfully employed the negro upon business, not belonging to the plaintiff's concerns, which was dangerous in its nature, and whereby Israel lost his life. The plaintiff owned three fields on the Cape Fear River—two on the west side and one on the east. The defendant was his overseer, and Israel a hand under him. The lower field on the west side of the river was called "Pemberton," below which the defendant and the negroes lived; and the upper field was called "The Point," and lay opposite the field on the east side. On the day before the accident occurred, the defendant, with Israel and other hands, was employed in floating logs out of the field on the east side of the river into the current, that by it they might be carried off, there being at the time a very large freshet in the river, spreading over the low grounds and cultivated fields. Late in the evening, the defendant went down the river in a boat with Israel, stopt a while at a raft belonging to a man named Nardin, and then proceeded down the river to where he and the slave resided. The next morning the defendant came up the river in his canoe with Israel, and, after a short stoppage at Nardin's raft, proceeded on his way to his business in floating off logs. Nardin went with them to where their business lay, and after working nearly all day, the defendant, still attended by Israel, came down to a raft belonging to a man named Cameron, where he got out of the boat, and directed Israel to carry Nardin, who was with them, to his own raft and then return for him. When Israel left Nardin's raft, he crossed directly over to the other side of the river, where the boat got entangled among the bushes, was upset, and Israel was drowned. Israel was about forty years of age, a stout, active man, a good waterman, and

understood the management of boats and canoes, and was acquainted with the river. This was proved by a witness for the plaintiff, who further stated, that he did not consider that there was any danger, in the main current of the river, to boats or canoes After Israel was drowned, the other hands, who had been employed in floating off the logs, came down the river in the course that the defendant had pursued in coming down. The case further states, that the usual course and the safest in getting from the dwelling of the defendant to the field on the east side, when a fresh was in the river, was through the low grounds of the Pemberton and Point fields to a spot opposite to the field on the east side. The case does not tell us distinctly on which side of the river the raft of Nardin was moored. We presume, however, that it was on the west side, as it is stated to have been a little above where the defendant lived.

The counsel for the plaintiff moved the Court to charge the jury, that the defendant had been guilty of gross negligence, which made him liable to the plaintiff's recovery. This was declined; and the jury were instructed, that it was the duty of the defendant to take the same care of the plaintiff's property under his control, that a man of ordinary prudence takes of his own; and, if they believed he had not taken such care, or that he had not taken care, or that he had placed the slave in a dangerous situation, not in his owner's business and employment, and the loss of the slave was from want of proper care or from unnecessary exposure to danger, it was gross negligence and the plaintiff was entitled to recover.

The jury found a verdict for the defendant and the plaintiff appealed.

We can see in the instuctions given no error, of which the plaintiff has a right to complain. In the argument, the case was treated as one of strict bailment, and the instruction asked for placed it upon that ground. An

overseer is not strictly a bailee, though many of the principles of that relation and many of its duties attach to him. It is his duty to take such care of the property entrusted to him, as a man of ordinary prudence would take of his own property. The Court could not give the instruction asked for—the case discloses no such gross negligence. The Court then instructed the jury what would amount to gross negligence. Was there error in this charge? We repeat, none, of which the plaintiff has a right to complain. The defendant, after spending as much time in floating off logs from the field on the east side of the river, as he thought was prudent and safe, left on his way to his residence on the opposite side of the river. He was obliged to cross the river to effect his purpose. Pursuing his ordinary course, he stopt at a neighbor's raft, and directed Israel to put Nardin on his raft about two hundred yards below and then to return for him. That he was in his ordinary course in returning home, is shown by his pursuing the same course the night before, and from the fact, that the other negroes in their boats followed in the same direction. Israel was not a boy, ignorant of boating, nor a feeble man, but hale and strong, living upon the river, skilful in boating and accustomed to managing boats and canoes; and the witness of the plaintiff stated, there was no danger in the body of the stream. To return from Nardin's raft to Cameron's did not require the negro to cross the river, both rafts being on the same side, and, where he left, about a hundred yards apart. Why he did cross it is not stated, and cannot now be known. We cannot perceive of what negligence the defendant was guilty, and think his Honor would have been justified in telling the jury, there was no evidence of any negligence.

Per Curiam. Judgment affirmed.

JOHN C. McDUGALD vs. ALFRED SMITH.

It is no ground of exception to a deposition, that the notice was given to take the depositions of A, B, C. and others, and the deposition of neither A, B., nor C. was taken.

Where a copy of a Statute of another State has been received in evidence in the Court below, upon insufficient proof, yet, if it is made to appear to this Court from an official and proper source, that the copy, so received in evidence, was correct, a *venire de novo* will not be awarded for that error.

Appeal from the Superior Court of Law of Columbus County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

McDugald, for the plaintiff.
Strange, for the defendant.

NASH, J. The action is in assumpsit on a promissory note by the endorsee. The general issue was pleaded, but the execution of the instrument admitted. The note was made in Maryland, where the payers lived. To prove the endorsement, a deposition was offered in evidence, which was objected to, and several reasons assigned. The *first* was the insufficiency of the notice, in this, that it notified the defendant that the evidence of two witnesses, whose names were mentioned, "and others," would be taken; and that neither of the persons, whose names were stated, were examined; but others were, whose names were not stated. *Secondly*, because the witnesses were not examined, on interrogatories; and thirdly, because the Clerk of the Court, in passing upon

the deposition, had given the defendant, or his counsel, no *particular* notice of the time and place of passing on it. These objections were over ruled. It was then objected by the defendant, that there was no evidence, that by the laws of Maryland, where the endorsement was made, such an instrument was negotiable. To answer this objection, the plaintiff offered in evidence a paper writing, purporting to be a certified copy of an act of the General Assembly of that State upon this subject; its reception was opposed, upon the ground that it was not certified according to law. His Honor being of a contrary opinion, it was received. There was a verdict for the plaintiff and the defendant appealed. We concur with his Honor in his opinion, as to the admission of the deposition in evidence. To support his first objection, the defendant's counsel cited the case of the *inhabitants of Ninnot against the inhabitants of Bridgewater*, 16th Mass. Rep. 472. We do not consider this case as an authority, by which we can be governed or even assisted, in our present enquiry. The Court, in that case, place their decision upon the statute law of the State. Their language is, "the Court being of opinion, that the notice required by *statute* was not sufficient, unless it contained the name of the person, whose deposition was to be taken." There, the notice contained the names of several persons, and nothing more as to any others. Now, it may be, that the statute of Massachusetts requires, in so many words, that the names of all the persons, whose depositions are to be taken, shall be set forth in the notice. If so, the deposition in that case could not be used, as the individual, whose testimony was taken, was not named in the notice. Be this, however, as it may, the Court, professedly, only gave their *construction* of the statute, and no doubt gave a sound one. But to make it bear upon our decision, or to assist us in placing a sound construction on our statute—it is not sufficient, that the statutes are in *pari materia*; it was the

duty of the defendant, to show by proper evidence, that their directions and provisions are the same. This he has not done. Nor do the Court, in their decision, name the statute, so as to enable us to examine it and see how far it corresponds with our act. In the different States, the practice in their several Courts is regulated, mostly, by their own statutes and usages, and it would be unsafe in putting a construction upon our statute, to be governed by that put upon a similar one in a sister State, without knowing what its provisions are. But there is another reason why the decision in Massachusetts, referred to, is not an authority in this case. As before stated, in that case, the notice was to take the deposition of certain specified witnesses, and a person was examined, whose name it did not contain. There the defendant might well say, perhaps, I did not and could not know that any persons would be examined, but those named in the notice, otherwise I should have attended; it is a surprise upon me. In this case he can rightfully make no such allegation; he was apprised that the examination would not be confined to the witnesses named. It was his duty to attend or be properly represented, that he might take care of his interest. The act of our Legislature points out no form, in which the notice shall be drawn; it simply directs, that notice shall be given the adverse party, of the time and place, when the "commission shall be executed." So far as the practice under it can be considered a construction of it, the notice complained of is proper. We see no provision in the act forbidding it, and no evil or danger resulting from it. The defendant, however, farther complains on this point, that the persons named in the notice were not examined. We know of no law requiring a party to examine all or any of the witnesses named in the notice. As well might it be required of a party to examine all the witnesses he summonses on a trial before a jury, and who are in attendance.

The 2nd exception to the deposition is properly abandoned.

The 3rd is, that the Clerk passed upon the deposition, without giving to the defendant or his counsel any *particular* notice of the time when, &c. The decision upon the first point renders it unnecessary to examine this objection.

In admitting in evidence the paper writing, purporting to be a copy of the law of Maryland, there was error. It was not certified, as required, either by the laws of the United States or of North Carolina. For this error we should certainly direct a *venire de novo*, if it would serve any good purpose. Availing ourselves, as we have before done in other cases, and as we consider our duty to do, of the facilities furnished us by the vicinity of the office of Secretary of State, we are satisfied the copy upon the trial was a true and correct copy of the Statute of Maryland upon the subject. We have been supplied with a copy of that law, certified as directed by the laws of this State. There is no complaint that the law of Maryland, is not as stated by the Judge, in his charge.—The complaint is, that the evidence, upon which his opinion was founded, was insufficient and contrary to law.—To what purpose grant a *venire de novo*, where we are satisfied that the law, upon which the case turned, has been correctly stated to the jury? Why send the case back to another jury, where the result must be the same. *Interest reipublicæ ut sit finis litium.*

Per Curiam. Judgment affirmed.

HENRY G. HAMPTON ex. DAVID M. COOPER, ADM'R.

Where an executor arrests a defendant on a *ca. sa.*, sued out on a judgment obtained by his testator, and afterwards dies, and the proceedings on the *ca. sa.* are discontinued, and then administration *de bonis non, with the will annexed*, is granted, this administrator is not liable in any way for the costs of the proceedings on the *ca. sa.*

The case of *Matlock* v *Gray*, 4 Hawks 1, cited and approved.

Appeal from the Superior Court of Law of Surry County, at the Spring Term 1850, his Honor Judge Dick presiding.

Boyden, for the plaintiff.

Morehead, for the defendant.

RUFFIN, C. J. The action is assumpsit, and, upon the trial on the general issue, the case was this. Stephen Haynes, as the executor of Moses Crissman, obtained a judgment in Surry Superior Court against Aaron Crissman, and sued out a *ca. sa.* and delivered it to the plaintiff, who was the Sheriff of Surry. He arrested the debtor, who gave a bond to appear, and take the benefit of the act for the relief of insolvent debtors. He appeared, and, upon a suggestion of fraud, an issue was made up. Before it was tried, Haynes died intestate; and no further proceedings were had on the issue for more than two terms, and the Court discharged the debtor from further attendance. Afterwards, the defendant, Cooper, obtained letters of administration *de bonis non* with the will annexed of Moses Crissman; and this action was brought against

him in that character for the plaintiff's fees and commissions on the execution. The Court was of opinion, that the action would not lie, and ordered a non suit; and the plaintiff appealed.

We suppose the administrator of Haynes could not have discharged the defendant out of custody, but that the power to do so or to complete the execution belonged to the administrator *de bonis non*, as incident to the debt, which was a part of the original testator's goods unadministered. But, in fact, the defendant did nothing in the matter, but the proceedings were at an end before he administered. Therefore it seems impossible to charge him in any capacity, by implying a promise to pay the plaintiff his commissions. The executor, who sued out the execution, was doubtless liable for the sheriff's poundage, if any body, besides the debtor, was. The sheriff was not bound to look to the testator's estate for his demand; for that might be insolvent, and he did the work at the instance of the executor himself. Haynes would, therefore, be liable in his natural capacity, if at all. *Mallock* v. *Gray & Harper*, 4 Hawks 1. If he acted with good faith and reasonable prudence in suing out the *ca. sa.*, and incurring this expense, he might claim to be indemnified out of the assets. That, however, is a different point from the present. We cannot tell, but that Haynes did retain an indemnity out of the assets. Whether he did or not, his personal liability excludes that of the administrator *de bonis non*; for the sheriff cannot have a right to look to both, so as to imply a separate promise from each. At common law there was no privity between the executor and the administrator *de bonis non*, and this case is not within the act of 1824.

PER CURIAM. Judgment affirmed.

WILLIAM GLOVER *v.* ABRAM RIDDICK.

A conversion, the object a defendant in an action of trover, consists either in an appropriation of the thing to the party's own use and beneficial enjoyment or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff, under a claim of right, inconsistent with his own.

Giving to a negro a certificate that he is free, does not amount to a conversion in the person giving the certificate, if the negro should turn out to be a slave.

Appeal from the Superior Court of Law of Perquimans County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

This is an action on the case, and the declaration contains three counts: one in trover for the conversion of two slaves from November 1847, to August 1848; one for harboring the said slaves; and one for trading with them.

The facts of the case, as they appeared on the trial, are as follows: In 1843, the plaintiff purchased from one Mitchell two slaves, named Tony and Armistead, then runaway: They were first seen in 1846 or 1847, in Nansemond County, Virginia, passing as free persons of color, under the names of Jack Douglas and Charles White; they worked for several persons, as free persons, and exhibited certain papers, called free papers, to several persons: they purchased goods out of the defendant's store in 1846 and 1847, and settled the account of 1846: they called on the defendant at his store in the said County, and asked him for a certificate of freedom, alleging that they had left their free papers, at some point distant from

the said store: the defendant called on two of the by-standers, to wit, his Clerk, and one Everitt, for the latter of whom they had worked, to state what they knew about their freedom, and they stated, that they had passed as free persons, since they came into the neighborhood, and that they had seen their papers with the County seal appended: thereupon, the defendant gave them a paper writing in the following words, to wit: "Newtown, November 8th, 1847. The bearer, Jack Douglas, a very stout black man, about 35 years old, lives in the neighborhood of my cotton factory, is free and of good character; his partner, Charles White, also a stout black man, (not quite so tall as Jack) about 35 years old, is also free, lives in this neighborhood and is also of good character; they are looking for work. (Signed,) Abram Riddick." It also appeared that they remained in the neighborhood until the Spring of 1848, when they left, and were apprehended at Weldon by one Scott, in the act of taking the cars; that he committed them to Halifax jail, where they remained six weeks or two months, and from which they were taken by the plaintiff in August 1848, and carried to Norfolk; that he paid the jail fees, amounting to forty dollars, and two hundred dollars to the jailor for the said Scott; that the said two hundred dollars were paid in pursuance of a reward he had offered by advertisement for their apprehension in 1843. The entire transaction, as appears, took place in the State of Virginia. The alleged free papers were identified on the trial, and turned out to be forgeries. The said Scott did not know of the reward offered, at the time he apprehended the said slaves. They stated to the defendant, when they applied for the certificate, that they wanted to go elsewhere to get work.

The Court charged, that the plaintiff could not recover on the count for trading with the said slaves, because it did not appear, that any law existed in Virginia, prohibiting such traffic; that he could not recover on the count

for harboring, because the mere selling of goods by the defendant, out of his store, would not amount to harboring. On the first count the Court charged, that any wrongful dominion, exercised by one man over the property of another, amounted to a conversion, and the giving of the paper writing in question was the exercise of such dominion. To this part of the charge the defendant excepted. On the subject of damages the Court charged, that the plaintiff was not entitled to recover the reward of two hundred dollars, nor any other sum by way of reward, as insisted on by his counsel; that he was entitled to recover the value of the hire of the said slaves from November 1847, to August 1848, the jail fees by him paid, and his reasonable expenses in going from Pasquotank to Halifax and returning. To the part of the charge, denying the plaintiff the right to recover the reward, as a part of the damages, the plaintiff excepts.

There was a verdict for the plaintiff according to the charge of the Court, and from the judgment thereon, both parties appealed.

A. Moore, for the plaintiff:

1st. Was there a converson?

Any use of or dominion or control exercised over the property of another, without the authority of the owner, is a conversion. *Greenleaf on Evidence*, 642 section.—It was certainly a high violation of the rights of the plaintiff, to use his slaves, to place in their possession a paper writing, the effect of which might be, to make it more difficult for the owner to recover his property, and probably to enable them to effect their escape to a free State. Such acts of ownership, exercised over these slaves, continued for three years, would have given the defendant a title to the slaves. *White* v. *White*, 1 Dev. & Bat. 100.

It is not necessary that Riddick should have known to whom these slaves belonged, in order to make his conduct wrongful. If he have not the authority of the owner, the act was a wrong to him—a violation of his rights of property. *Lee* v. *McKay*, 3 Ire. 29.

If the facts of this case do not amount to a conversion, I fear the security of slave property will be very materially lessened. Excuses would not be wanting, for affording them facilities for continuing out of the employment of their owners, or for effecting their escape out of the State.

2nd. The Judge ought to have left it to the jury to say, what amount of compensation the plaintiff was entitled to, for the wrong which had been done by the defendant. The slaves had been runaway several years, and if the security of his property had been endangered, or the probability of his ultimately losing them had been increased by the act of the defendant, it was a risk, for which he was entitled to compensation. Similar acts in others might have been the means by which the slaves were kept out of the employment of their owner, and which justified him in exciting public vigilance by offering a large reward.

It was not contended on the part of the plaintiff, that he was necessarily entitled to recover of the defendant the $200 which he paid; but that or such other sum as the jury might think the plaintiff was entitled to under all the circumstances.

The Act of Assembly encourages the apprehension of runaway slaves, by subjecting the owner to pay a certain sum, to whoever may apprehend them—to this amount the plaintiff is clearly entitled. The policy of the country is in favor of the claim, which the plaintiff sets up to a reasonable reward. I refer to *Greenfield Bank* v. *Leavitt*, 17 Pickering 1. as deciding it was the duty of the Judge to have left it to the jury to say what was the a-

mount of damages the plaintiff was entitled to—whether the amount paid by him or what lesser sum.

Heath and Ehringhaus, for the defendant.

Two questions only are presented:

1st. Has there been any conversion on the part of the plaintiff?

2nd. If so, what is the rule of damages?

1st. A conversion is defined to be, a tortious *taking* of a chattel; a wrongful assumption of property in it; an illegal use of it; or any wrongful act, whereby the defendant deprives the plaintiff of his property for a short time even. *Leigh's Nisi Prius*, 1477, 1478.

It is submitted that the defendant has been guilty of none of these acts. He has not *taken* the property of the plaintiff, tortiously or otherwise; he has assumed no property in it; he has made no use of it, illegal, or otherwise, nor has he done any wrongful act, *whereby the plaintiff has been deprived of his property for one moment.* He merely expresses an opinion that two negroes were free, who had passed as such, in his neighborhood, for years. There is no evidence that this paper was ever seen, at any time after it was given to the slaves, or that they were kept from their owner, in consequence of possessing the paper, for one moment; and it is submitted, that without such evidence, it is no more a conversion, than it would be, if one were to express the opinion, that a barrel of wine was a barrel of water; indeed, had they been kept from their master, by the aid of these papers, an action on the case, and not trover, would have been the proper remedy.

2nd. Suppose, however, there was some evidence of a conversion to go to a jury, what is the rule of damages? Could the reward paid, be added to the actual damages? *Leigh*, in his *Nisi Prius*, page 1500, says the damages

are the value of the property, at the time of the conversion, or at any subsequent time; if the plaintiff have regained his property, nominal damages are generally to be assessed; but such actual damages, as *are necessarily consequent* on the plaintiff's act, may also be given; the paying of this reward, or any reward, was not necessarily consequent on the defendant's giving this paper, since it was never seen in their possession, the person to whom the reward was paid knew not of its being offered more than three years before, and the slaves were runaway, four years previous to the giving of this paper by the defendant: what connexion had the paper, with the payment of the reward? The reward was offered more than three years before the paper was given; the paper, so far as is known, was never seen in the slaves' possession, after it was given, and the reward was a voluntary payment, made to a man who had no knowledge of its being offered, and made near four years after it had been offered.

NASH, J. None of the acts of the defendant, which are stated in the case, taken separately or together amount in law to a conversion. A conversion, to subject a defendant in an action of trover, consists either in an appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession from the defendant under a claim of title inconsistent with his own. Such is Mr. Greenleaf's summary of the acts of a defendant to constitute a conversion in the sense of the law of trover. 2 Vol. of Evi. See 642. Which one of these acts, it may be asked, has this defendant been guilty of? The defendant is a merchant; and in 1846 and 1847 the negroes in question first appeared in his neighborhood, claiming and acting as free men. They remained in that

neighborhood until the 8th of November 1849, and during that time worked for different persons, openly. They purchased goods out of the defendant's store in 1846 and '47, and settled and paid the account of the first year, and exhibited to various persons free papers, as they are called. On the 8th of November 1847, they requested the defendant to give them a certificate, that they were free, alleging, that they had left their free papers at a house some distance off. The defendant called on his clerk and a Mr. Everitt, who was in the store, and for whom they had worked, to state what they knew of their being free. They both stated that the negroes had passed as free, ever since they had been in the neighborhood, and that they had seen their free papers with the County seal appended. The defendant then gave them the certificate set forth in the case—in which he certifies they are free. This is the only act, upon which the plantiff relies to prove a conversion. Admit it was a wrongful act, yet it is not every tortious act, affecting the property of another, that amounts to a conversion; thus, cutting down his trees, without taking them away, is no conversion. *Myers* v. *Solebay* 2 Mod. 245. The giving of the certificate was certainly a very indiscreet act, to say the least of it, but is no evidence of an act of ownership on the part of the defendant—it expressly disclaims it. His Honor, however, ruled, that the giving the paper writing by the defendant, was the exercise of such dominion over the slaves as amounted to a conversion. In this opinion we think there is error. We agree with his Honor, and for the reasons expressed by him, that the plaintiff cannot recover upon the counts for harboring or trading with the slaves. As, in the opinion of the Court, the plaintiff cannot recover in this action upon any of the counts in his declaration, no opinion is expressed as to the question of damages.

There being error in the charge, upon the count in trover, upon which the verdict was given, the judgment is reversed and a *venire de novo* awarded.

Per Curiam. Judgment reversed and a *venire de novo*

ALEXANDER REID & AL. vs. THOMAS PASS & AL.

Where a petition had been filed in the County Court by the next of kin of an intestate for the sale of negroes for the purpose of distribution, and a sale had been made by a commissioner appointed by the Court, according to the prayer of the petitioners, and he had paid over to them what he alleged to be their full respective shares; it is not competent for these petitioners to file a subsequent, original petition in the same Court, charging that the commissioner had not paid them their full shares, (they having signed a receipt in full by mistake) and requiring the commissioner to account, &c. and pay over the balance, &c.

Their relief could only be obtained by an application to the County Court for a rehearing, if the proceedings of the Commissioner had been confirmed, or by recourse to a Court of Equity to set aside the receipt, if given through mistake.

Appeal from the Superior Court of Law of Caswell County, at the Fall Term 1850, his Honor Judge Manly presiding.

Morehead, for the plaintiffs.
Kerr, for the defendants.

Nash, J. Whatever may be the merits of the petitioners, they cannot in these proceedings obtain the relief, they seek, The petition was filed at the September

Term 1849, of Caswell Court of Pleas and Quarter Sessions; and set forth, that, at January Term 1849, of the Court, the defendant, Pass, as executor of Thomas Reid, dec'd, filed a petition against the petitioners, as next of kin with the testator of John Gamble, dec'd, for the purpose of selling a parcel of negroes belonging to the estate of John Gamble, in order to make a division among the next of kin: that a decree was made for the sale and distribution of the proceeds, and Thomas Pass, the present defendant, was appointed by the Court a commissioner for that purpose, who duly sold the negroes and paid over to the petitioners what, he alleged, was their proper shares, for which they gave him a receipt in full, dated in August 1849. The petitoners allege, that the receipt was written to be in full by mistake and not so intended to be by them, as a considerable sum is still due them as next of kin of John Gamble. The prayer of the petition is, that the Court will "cause a copy of this petition, together with the State's writ of Subpœna, to be issued and served on the said Thomas Pass, as *commissioner aforesaid*, and as executor of Thamas Reid, requiring him to appear," &c., "and full, true, and prefect answer make," &c., "and also to account and pay to the petitioners the balance," &c. The proceeding throughout is an original one in the County Court against Thomas Pass as an officer of the Court, and acting as their commissioner. What has become of the first suit, we are not informed. It may be still pending, or there may have been a report and final decree. Whichever may be the case, it is evident the petitioners have mistaken their remedy. If the defendant, Pass, has in his hands any money arising from that sale, which rightfully belongs to the petitioners, he holds it still as commissioner, and it is under the control of the Court and subject to such order as they may make. The proper course for the plaintiffs to have taken in the Court of law was to move in that cause, either when the com-

missioner made his report, or by the necessary steps, to procure, a rehearing or review of such decree as may have been made. This proceeding cannot be sustained. So far as the setting aside the receipt complained of is involved, the County Court, as an original matter, has no jurisdiction, but as incidental to the discharge of his duty by its commissioner, it has power both to hear and to grant redress. To a Court of Equity belongs the original jurisdiction in such matters.

The decree made by his Honor below is affirmed, and the petition dismissed with costs.

PER CURIAM. Decree affirmed and petition dismissed.

THOMAS THREADGILL vs. JOSEPH WHITE.

Where notice has not been given to produce a bill of sale or other instrument of writing, or where its absence is not satisfactorily accounted for, it is not competent to introduce, as evidence of the execution or contents of the instrument, the oral admissions or declarations of the alleged maker.

A party cannot introduce secondary evidence of the contents of a written instrument, merely upon shewing that the instrument, though in existence, is in another State.

The case of *Davidson* v. *Norment*, 5 Ire 555, cited and approved.

Appeal from the Superior Court of Law of Anson County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

This is an action of assumpsit, which was tried on the general issue. The case was, that the defendant as

sheriff sold some slaves under writs of *fieri facias* against the plaintiff; and the present suit was brought to recover a surplus of the proceeds after satisfying the executions. The defence was, that the plaintiff was not entitled to the surplus; because the slaves were not his, but he had conveyed them by deed to one Colson before the defendant took them. In support of the defence evidence was given, that Colson had removed from this State and carried the bill of sale with him; and then the defendant offered a witness to prove the contents of the deed. But, upon objection by the plaintiff, the Court ruled out the evidence, because the non-production of the instrument was not sufficiently accounted for. The defendant then offered a witness to prove, that the plaintiff, upon his examination as a witness in a suit brought by Colson for the slaves, stated that they belonged to Colson and that he, the plaintiff, had no interest in them. But the Court refused to receive the evidence; and, after a verdict and judgment for the plaintiff, the defendant appealed.

Dargan and Strange, for the plaintiff.
Mendenhall, for the defendant.

Ruffin, C. J. It is understood from the case, that the mode, in which the title to the slaves was supposed to have passed from the plaintiff to Colson, as proposed to be established by proof of the declarations of the plaintiff, was by the deed of conveyance, which the defendant had previously alleged. That presents the enquiry, whether it be competent to prove the title of Colson derived under the supposed deed—in other words, the contents and operation of that instrument—by oral testimony of the plaintiff's admissions on those points. The Court is of opinion, that it is not. It is to be observed, that the title to the slaves is the gist of this controversy; and therefore that the execution, terms, and legal effect of the deed, by which

it was alleged to have passed were directly in issue. It is perfectly settled, that the evidence of its execution, if produced, must be by the subscribing witness, and that the want of that evidence cannot be supplied by proof of the party's admission *in pais*. Much less, it would seem, can such an admission supply both the place of the subscribing witness and the production of the instrument.—There have been cases in which, as exceptions to the general rule of evidence, the admission of a fact by a party was considered sufficient to dispense with the regular proof of deeds. They are not numerous, and are stated in 1 *Phil. Ev.* ch. 7, sec. 6; and they seem to be in cases in which the subject of the deed was collateral to the principal thing in issue. There appears, however, to have been much conflict of opinion on the admissibility of such declaration: and it is admitted, that the Court of Exchequer has held, that an admission of the party is competent evidence of the contents of a deed, so as to dispense with its production and proof of its execution, even when the contents are directly in issue. *Slatterie* v. *Pooley*, 6 M. & W. 663. That decision has been followed by other cases, in which the doctrine has been either laid down or assumed, so that, perhaps, it may be said to prevail at this time in that country. It has, however, been stoutly resisted both on the bench and by reputable writers. The Chief Justice of Ireland, in *Lawless* v. *Queale*, 8 Irish Law Rep. 385, did not hesitate to follow Lord TENTERDEN, in *Blosam* v. *Elsee*, Ry. & M. 187, and said, that the doctrine of *Slatterie* v. *Pooley* was most dangerous, as it opens the door to fraud and surprise by false testimony of the contents of a deed in the form of the party's admission, instead of having the deed itself. It seems to be in direct opposition to principle: the evidence being received as primary, and the production of the deed, and notice to produce it, and direct proof of its execution being dispensed with. For, if it be attempted to prove the

contents by a person, who has read it, the law will not hear him, even after proof of execution, unless the non-production of the deed be accounted for; and the reason is, that the law will not trust to the frail memory of any man upon that point, when the higher grade of evidence, constituted by the instrument itself, is kept back. There is evidently the same reason for refusing the evidence of a person, who deposes upon his recollection of what the party said of the contents. That is, indeed, going a step farther than in the former instance, since there is not only danger, that the witness may have misunderstood or not fully remembered what the party said, but also that the party may not have remembered and understood the terms and effect of the deed correctly. The incongruity will be the more readily seen, if we suppose the same witness, who is called to prove the party's admissions of the contents of a deed, to state also, upon further examination, that he, upon his own knowledge and remembrance, could state the contents, and that they were entirely different from those stated by the party, so as to show that the party by mistake understood the deed to operate more strongly against him than in fact it did. Would it not seem as strange a thing as can be, that the better recollections of the witness, as they may be, of the contents of the instrument—which, perhaps, be attested—should not be admissible, while his recollections of the party's declared and mistaken recollections, as to the contents, should be sufficient to establish them? There is clearly in each case the danger, that the Court and jury may be misled; on which the rule of evidence rests, which rejects inferior evidence, because better may be had, and upon that ground requires the production of deeds as the best proof of their contents. In this country that view seems to have been generally taken of the question. In *Welland Canal Company* v. *Hathaway*, 8 Wend. 181, the rule is stated in very correct terms, as it seems

to the Court, by Mr. Justice Nelson, now of the Supreme Court of the United States. After citing several cases, he laid it down, as an undeniable proposition, that the admissions of a party are competent evidence only in cases where parol evidence is admissible to establish the same facts, or, in other words, where there is not, in the judgment of the law, higher and better evidence in existence. He said further, that it would be a dangerous innovation upon the rules of evidence to give any greater effect to the admissions, unless in open Court; and the tendency would be to dispense with the production of the most solemn documentary evidence. No case to the contrary in this Country has been found; and it is in the experience of each member of the Court, that in this State the rule on the circuits has always been to require the deed itself. The present is the first instance in which a question has been raised on it, and the Court feels bound to abide by the old rule.

As to the other point, that secondary evidence of the contents of the deed was admissible, because the deed, though in existence, was in another State, the case of *Davidson* v. *Norment*, 5 Ire. 555, is a direct authority the other way.

PEARSON, J. Is it competent to prove the admissions of a party, as to the contents of a writing, without notice to produce it, or accounting for not offering the writing itself?

According to the English cases, such evidence is competent, upon the ground that the admissions of a party against his own interest is *primary*, and not *secondary*, evidence. *Slatterie* v. *Pooley*, 6 M. & W. 663. *Regina* v. *Welch*, 2 Car. R. 61 E., ch. 1, sec. 296. One of the points on the trial at *nisi prius* was the admissibility of declarations of the defendant, as to his appointment, which was in writing. The case was reserved for the consider-

ation of the fifteen Judges; and when it was called for argument, the prisoner's counsel abandoned the point, as *not debatable*. "According to the case of *New Hall* v. *Holt*, 2 M. & W. 662, and *Slatterie* v. *Pooley*, id. 663, I must concede, that admissions made by a party, as to the contents of a written document, are evidence against him." See *Best*, on the principles of evidence.

After much reflection, according to my judgment, the "reason of the thing" is against the admissibility of the evidence. I therefore concur in the opinion, that the evidence was not admissible.

PER CURIAM. Judgment affirmed.

SALLY A. TARKINTON *vs.* CHARLES LATHAM, ADM'R, &c.

Where a grand father, since the act of 1806, made a parol gift of a negro woman slave to his grand-daughter, and placed the slave in possession of the grand-daughter's father, with whom she lived, as her property, and the negro was always alleged by the father to belong to the grand-daughter—*Held*, that the father, and, of course, any person claiming under him, were estopped to deny the grand-daughter's title.

Appeal from the Superior Court of Law of Washington County, at the Fall Term 1850, his Honor Judge CALDWELL presiding.

This was an action of trover, brought to recover a negro woman, a slave, by the name of Marina, and her two children.

The plaintiff proved, that Marina was once the property of Zebulon Tarkinton, who made a parol gift of her to his grand-daughter, the plaintiff, when she was an infant, and quite small. At the time of the gift, the slave was delivered to the plaintiff, by the grand father's taking the hand of Marina and placing it in the hand of the plaintiff: and, thereupon, Joseph Tarkinton, the plaintiff's father, with whom she was living, took possession of Marina, for and on behalf of his daughter, and continued that possession, repeatedly declaring that Marina was not his property but belonged to the plaintiff, until shortly before his death, when he sold and delivered the slave to Thomas Myers, the defendant's intestate. The plaintiff was about 21 years of age at this trial, and was proved to have lived in her father's family, 'till his death in the year 1841.

Zebulon Tarkinton, the grand-father, died in the year 1834, a few years after the gift. Shortly after the death of Zebulon Tarkinton, and at the sale of his personal estate, one ——— Spruill, who conducted the sale and professed to be the administrator, enquired of Joseph Tarkinton, for Marina, and demanded her of him, that he might sell her as the property of said Zebulon. Joseph Tarkinton refused to deliver her or permit her to be sold, declaring that she was the property of his daughter, and had been given to her by her grand-father, the said Zebulon, and referred to the witnesses, who were present when it was done. One of the witnesses appealed to was the said Thomas Myers, who thereupon stated, that himself, and another witness, were called on to witness the gift: that the said Zebulon did give and deliver Marina to the plaintiff, for a nurse, and that Joseph Tarkinton then took possession for his daughter. Marina was not present at this sale, but was then in possession of Joseph Tarkinton, and was at his house.

It was further proved, that Joseph Tarkinton, while Marina was in his possession, claimed her for the plain-

tiff, declaring at some times that she was his daughter's property, at others that she was given to his daughter by her grand father in presence of two witnesses; and that Myers had often expressed a wish to purchase Marina, but said he could get no title as she belonged to the plaintiff.

Myers purchased Marina of Joseph Tarkinton, in the year 1841, shortly before which he remarked to a witness, "I can now try and get a good title to Marina, from Joe Tarkinton, for the other witness to the gift is dead, and I cannot be compelled to swear against myself."

No will of Zebulon Tarkinton was offered in evidence, and to show that the said ——— Spruill was administrator, the plaintiff offered to prove that he took possession and sold the goods and effects of said Zebulon, and acted as administrator, in the settlement of his estate, and further that at the sale referred to, which was conducted by him as administrator, the said Myers became purchaser of part of the property sold. This evidence was objected to by the defendant, but the presiding Judge, reserving the question of its admissibility, permitted the proof to be made. It was admitted that Myers had converted to his own use, the slave Marina, and also two children, born after his purchase from Joseph Tarkinton, and before suit.

It was insisted for the defendant, that the plaintiff could not recover, for that she acquired no title by the gift, nor had she such an adverse possession against Joseph Tarkinton, as would transfer to her the title to the said slave.

The Court charged the jury, that, although the parol gift in the first instance conveyed no title to the plaintiff, yet if the possession of the slave in question were held by her, or by her father for her, and, upon a demand being made by the said administrator to sell said slave, her surrender was refused; and therefore she was held by the

plaintiff, or by her father for her, three years adversely to the title of said administrator; the plaintiff would be entitled to recover.

The jury returned a verdict in favor of the plaintiff.—Rule for a new trial for misdirection to the jury, and because of the admission of improper evidence. Rule discharged, judgment and appeal.

Smith, for the plaintiff.

A. Moore, for the defendant, submitted the following argument:

1st. The evidence, that Spruill acted as administrator, in order to prove that he really was, was inadmissible.—All the books on evidence lay down the rule to be, that, when an administrator sues upon a cause of action, that arose in the life time of his intestate, he must either make a profert of his letters of administration, or upon oyer, they must be exhibited—if he sues upon a right of action, that has accrued since the death of the intestate, the plea of the general issue makes it necessary for him to exhibit his letters, as a part of his proof.

If, therefore, Spruill was not the administrator of Zebulon Tarkinton, the plaintiff very clearly has no title.—For the parol gift passed none, and no adverse possession, since the death of Zebulon Tarkinton, has been held by the plaintiff, against any one who could sue.

2nd. If the evidence offered established the fact, that Spruill was the administrator of Zebulon Tarkinton, it is then insisted, on the part of the defendant, that the plaintiff has no title.

It is laid down in *Story on Bail*, 79–80, if A. delivers goods to B., to be delivered over to C., then C. hath the property and may demand the goods. That principle manifestly applies to such articles of personal property, the title to which passes by delivery. It cannot be ap-

plied to slaves, as our act of Assembly makes all attempts to dispose of them by gift void, unless by a deed of gift properly attested.

The gift, then, to Joseph Tarkinton, for his daughter, was a mere bailment, to continue at the will of the bailor or bailee.

Nor can the plaintiff make out her title under the Statute of Limitations. When the demand was made of Joseph Tarkinton, by Spruill, he refused to deliver up the negro, alleging that his father had given the negro to his daughter. This gave Spruill a right of action against Joseph Tarkinton, but not against the plaintiff in this action. She had no possession of the negro, and set up no claim to her, in opposition to the rights of the personal representative of Z. Tarkinton. If Spruill could maintain no action against this plaintiff, then it is clear that the Statute of Limitations did not run in her favor. And for the reason, that the action could be maintained against Joseph Tarkinton, upon his refusal to deliver the property, the Statute then commenced running, and would confer title upon him, at the expiration of three years. A possession to be adverse need not be accompanied with a claim of title. *White* v. *White*, 1 Dev. & Bat. 260.

The case shows that the plaintiff never had an adverse possession of this slave.

3rd. Joseph Tarkinton was not the bailee of the plaintiff. It is a necessary part of every contract of bailment, that the article bailed should be delivered by the bailor or his authorized agent to the bailee. *Story on Bailments* 1 and 2.

4th. The plaintiff's right to recover, then, rests entirely upon the declaration of Joseph Tarkinton, that he held the property for her. Such a declaration cannot pass the title. *Jones* v. *Sasser*, 1 Dev. & Bat. 452.

RUFFIN, C. J. The plaintiff could have entertained this action against her father upon her coming of age. He could not have set up the grand-father's title against her, because he did not receive the negro to hold for the owner, whoever that might be, but, he received her expressly as his daughter's, and engaged to hold her as the agent of the plaintiff and for her. He could not, therefore, dispute her right, but was estopped to deny it. That estoppel was imparted to Myers, as he bought and received the slave from the father, and thus became his privy in estate; and it extends to the defendant, the administrator of Myers. The verdict and judgment, were, therefore, clearly right on that ground; and as they rest upon the estoppel, arising out of the relation of bailor and bailee, or principal and agent, between the plaintiff and her father, any particular demerits of Myers are not to be regarded, since the estoppel would affect any other purchaser from the father in the same manner.

PER CURIAM. Judgment affirmed.

DANIEL McNAIR *vs.* JOHN A. McKAY, ADM'R, &c.

No action at law can be maintained, to collect the assets of a deceased man, except by his personal representative; but where A., claiming a slave as a distributee of B, employs C. to sell such slave, and C. accordingly sells the slave and receives the price, he receives it for the use of A., and cannot dispute the title of A., but is bound to account with him for the sum received.

The case of *Dunwoody* v *Carrington*, 2 Car. L. R. 469, *Means* v *Hogan*, 2 Ire. Eq. 525, and *Love* v *Edmunds*, 1 Ire. 152, cited and approved.

Appeal from the Superior Court of Law of Bladen County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

This was an action of assumpsit, in which the plaintiff declared for money had and received, and in the other money counts. Pleas, "the general issue. Statute of Limitations."

On the trial the evidence was, that, some time in the year 1848, the defendant's intestate sold a negro slave named Jack, for seven hundred and fifty dollars, and received four hundred dollars, part of the purchase money, and said that he was acting as the agent of the plaintiff. The negro Jack had belonged to one Dugald Blue, who died in the month of August 1828, leaving five children with one of whom named Annie, the plaintiff intermarried.

The purchaser said he thought he had paid the balance of the purchase money for Jack, to John F. Blue, who was one of Dugald Blue's children. Another witness testified, that, in 1842 or 1843, he believes in the latter year,

he endorsed a note for the intestate to enable him to borrow some money from the bank, the intestate saying, he wanted it for the plaintiff, who was expected to come in from Tennessee where he resided.

The intestate said afterwards, he had laid out the money in the purchase of goods. He died in the Fall of 1844. And the defendant took out letters of administration on his estate, and in October 1846, the plaintiff, by a regularly constituted attorney, made a demand upon him for the money, which his intestate had received as the plaintiff's agent for the sale of Jack. The defendant refused to pay the amount claimed, which was one fifth of the whole purchase money with interest: and the suit was commenced in 1848 There was no distinct evidence, that any letters of administration had been taken out on the estate of Dugald Blue, dec'd, and the defendant contended, that, whether there was or not, the plaintiff could not recover, for if there had been no administration, no person could claim the slave Jack, or his proceeds, except as administrator of the said Dugald Blue, and if there had been an administration, the slave or his proceeds belonged to such administrator, or, if he were dead, to an administrator "*de bonis non.*"

The Court instructed the jury, that the principles of law, contended for by the defendant, were correct, and would determine this case in his favor, if the length of time and other circumstances would not enable them to make such presumptions, as would support the plaintiff's title—that, if they found that the defendant's intestate had possession of the slave, on the day of sale, eighteen years after the death of Dugald Blue, or the plaintiff's agent had sold him as such, and subsequently acknowledged that he held the proceeds of such slave for the plaintiff as his agent, they were at liberty to make any, and every presumption, as against the defendant's intestate, to support his right to recover. The jury under this instruction

returned a verdict for the plaintiff, and the defendant, after an ineffectual motion for a new trial, for misdirection by the Court, appealed to the Supreme Court.

McDugald, for the plaintiff.
D. Reid and Banks, for the defendant.

NASH, J. We see no such error in the charge of the Judge below, as to authorize this Court to interfere with the judgment. The plaintiff is entitled to retain his verdict. It is not denied that John McKeethan, the intestate of the defendant, as the agent of the plaintiff, sold, in 1838, a negro man slave, and received the purchase money, which he converted to his own use. The money, so received by the intestate, was received by him to the use of the plaintiff. On the part of the defendant, however, it was insisted, that the slave so sold by the intestate, had belonged to one Dugald Blue, who died intestate in the year 1820, and that no action could be brought to recover the proceeds of the sale, except by his administrator. The principle contended for is correct. No action at law can be maintained, to collect the assets of a deceased man, but by his personal representative. This is not a case, however, for its application. The action is not brought to collect in the assets of Dugald Blue; but the plaintiff seeks to recover the money in contest, upon a personal contract with the intestate, John McKeethan. If an action had been brought by the plaintiff against the intestate, to recover the negro, before the sale, or the proceeds of the sale, the intestate could not have been heard to deny the title of the plaintiff in either case; so neither can the defendant who stands in his place. See *Dunwoody* v. *Carrington*, 2 Car. L. R. 469. *Means* v. *Hogan*, 2nd Ire. Eq. 525. *Love* v. *Edmonds*, 1 Ire. Rep. 152. *Story on Agency*, sec. 217.

PER CURIAM. Judgment affirmed.

THEOPHILUS M. BELL *vs.* WILLIAM B. TOOLEY.

A Court Martial is a Court of special and limited jurisdiction. It must be organized agreeably to law, and this must be shewn distinctly by every one, who seeks to enforce its sentences or justify action under its precepts. Therefore, where a company court martial, as is required by our law, must be composed of at least two commissioned officers, and it did not appear in this case that more than one commissioned officer sat in the Court, an execution, issued by a tribunal so constituted, is void and does not justify an officer in acting under it.

Appeal from the Superior Court of Law of Hyde County, at the Fall Term 1850, his Honor Judge ELLIS presiding.

Rodman, for the plaintiff.
Shaw, for the defendants.

NASH, J. The action is in trover, to recover the value of a horse belonging to the plaintiff, and alleged to have been converted by the defendant. The defendant, who was a duly qualified officer of Hyde County, justified under process issued by a military Court martial. To sustain his defence, he produced a paper writing, purporting to be a judgment rendered by a company court martial, composed of William Fisher, as acting captain, Major O'Neal, as acting lieutenant, and the ensign of the company, against the plaintiff, for the amount of a fine imposed on him for not attending the preceding muster of

the company, of which he was a member; a paper writing, purporting to be an execution signed by William Fisher, as captain, to collect from the plaintiff the amount of the judgment, was also offered in evidence by him; and, after objection, admitted by the Court. By color of this paper, the horse in question was levied on, and sold by the defendant. He also introduced a paper, under seal of the State, purporting to be a commission to Fisher, as captain of the company, and bearing date before the sitting of the court martial, at which the judgment was given, but no commission to either of the other officers, who sat on the court martial, was offered. It was proved by the commanding officer of the regiment, that he had administered the oaths of office to Fisher and O'Neal.—The reception of this testimony was opposed by the plaintiff, but admitted. The plaintiff objected to the reception in evidence of the alleged judgment and execution: *First*, because it did not appear, that the officers comprising the Court martial were commissioned officers and authorized to hold a Court martial. *Secondly*, because it did not appear, that the said officers had been duly qualified by taking and subscribing the oaths required by the Act of the General Assembly. *Rev. Stat.* ch. 73, sec. 31. *Thirdly*, because the judgment was void, the plaintiff never having had any notice of the proceedings against him. To sustain his first objection, he offered to prove, that the commission to William Fisher, offered in evidence, had been issued in blank and filled up with the name of William Fisher by the commanding officer of the regiment, to which the company belonged, after the conversion by the defendant; and that Fisher was not duly elected by the company. The Court over-ruled the objection to the commission.

The jury were instructed, that, if the defendant, at the time he took the horse, had in his hands an *execution*, upon its face regular, and issued *by a court martial*, hav-

ing jurisdiction of the subject matter, he would be justified: that, in this case, the *execution* appeared upon its face to be regular, and would justify the officer, if they should be of opinion, that the officers of the Court martial were elected by a majority of the company, and, at the time they rendered the judgment, the *acting* officers of the company.

We do not concur in the above opinion. The error of his Honor consisted, in considering the paper, purporting to be an execution, to be a valid one. The objection is, that it is not an execution, and therefore could confer upon the defendant no authority whatever.

The first and second objections of the plaintiff to the justification, relied on by the defendant, are to the organization of the Court. They raise the question, had the individuals, assuming to act as a Court martial, any legal right to perform the duties of such a tribunal? If they had, then his Honor was correct, as to the effect of the execution, in protecting the officer. If not, there was no legal tribunal, and the whole proceedings were *coram non judice*, and entirely void A Court martial is a Court of special and limited jurisdiction, called into existence for a special and limited purpose. It exists only temporarily, and when the business, for which it is called, is transacted, it ceases to exist. Such a Court must be organized agreeably to the law, and this must be shown distinctly by every one, who seeks to enforce its sentences or to justify action under its precepts—the law will intend nothing in its favor. *Brooks* v. *Adams*, 11 Pick. Rep. 441. *Mills* v. *Martin*, 19 John. Rep. 7. *Wise* v. *Withers*, 3 Cranch 331. In the latter case, Chief Justice MARSHALL declares, that "the decision of such a tribunal, in a case clearly not within its jurisdiction, cannot protect the officer, who executes it." Much more must it fail of such an effect, where, from a defect in

its organization, it fails to be a Court. The Court martial in this case was ordered under the provisions of the act of 1836—*Rev. Stat.* ch. 73. By the 16th section, "the captain or commanding officer of a company shall muster his men at least twice in the year," and it is made the duty of every private to attend the musters, under a specified penalty. The 17th section authorises "the *commissioned* officers of the company or any two of them to meet in Court martial, and proceed to try and determine on all cases, that shall be brought before them," &c. This requisition was not observed in constituting the Court martial in this case. It is stated in the bill of exceptions, that Fisher was the acting captain of the company, and O'Neal the acting lieutenant, and that the Court martial was composed of them and the ensign of the company. Admit that the commission to Fisher was legal, it is not pretended, that either O'Neal or the ensign ever had been commissioned, and it is explicitly stated, that no commission for either of them was produced on the trial. This section of the Act requires, that a company Court martial shall be held by the *commissioned* officers of the company or any two of them. To constitute, therefore, a legal company Court martial, there must be at least two commissioned officers. Here, giving the defendant all that he could ask, there was but one.

His Honor erred in rejecting the evidence offered by the plaintiff, to show, that the commission to Fisher was issued in blank and filled up after the conversion. The evidence rejected is to be regarded *pro hac vice* as true. Without enquiring into the objection, that the commission issued in blank, here it was shown, that the blanks were not filled until after the conversion; and proves conclusively that the Court was not organized according to law.

There is nothing in the third objection of the plaintiff. No personal notice to the plaintiff of the time of the trial

was, under the Act of 1836, necessary. The 32nd section provides, that the calling of the names of the delinquents or absentees by the captain or commanding officer, and the proclamation made for their attendance at the succeeding Court martial, shall be sufficient notice. This provision is a strong reason for holding Court martials, in their organization, to a strict compliance with the law.

For the errors pointed out in the opinion of his Honor, the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and a *venire de novo*

WALDO AND SHERROD *vs.* ROBERT BELCHER.

Where a person had in store three thousand one hundred bushels of corn, and sold twenty eight hundred bushels of it to A., but the 2800 bushels were never separated from the 3100 bushels and the whole was afterwards destroyed by fire, *Held*, that the property in the 2800 bushels had not passed to A., as there had been no delivery; and therefore A. was not bound to pay the stipulated price. And this result follows, whatever may have been the intention of the parties, as to the property passing presently, on the contract being made.

The cases of *Devan* v *Fennell*, 2 Ire. 36, and *Allman* v *Davis* 2 Ire. 12 cited and approved.

Appeal from the Superior Court of Law of Pitt County, at the Fall Term 1849, his Honor Judge BAILEY presiding.

B. F. Moore and Biggs, for the plaintiffs.
Rodman, for the defendant.

Pearson, J. Ferguson & Milhado, of Norfolk, had in store for the plaintiffs 3134 bushels of corn. On the 25th of March 1848, the plaintiffs sold to the defendant 2822 bushels of the corn at $2 60 per barrel; and in payment took the bill of the defendant, (which was never paid and was returned at the trial.) and gave the defendant an order upon Ferguson & Milhado for the corn, which order was returned by them to the defendant. On the 2nd of May 1848, the parties agreed, that the plaintiffs should draw a bill on Ferguson & Milhado for $117 66, at ninety days, which the defendant should endorse; that the corn, mentioned in the order, should be subject to the control of the defendant, and, should be sold by him before or at the maturity of the bill, and the proceeds applied to the payment of the bill; and if the proceeds should be more or less than the amount of the bill, it was to be a matter for future adjustment. The bill was accordingly drawn and endorsed, and accepted by Ferguson & Milhado, who paid it to the endorser, by whom it was discounted for the plaintiffs, and it was finally repaid to Ferguson & Milhado by the plaintiffs. The whole of the 3134 bushels of corn remained credited to the plaintiffs on the books of Ferguson & Milhado, until June 1848, when it was destroyed by fire. The 2822½ bushels *were never separated from the bulk of* 3134 *bushels.*

The action was assumpsit for the price of 2822½ bushels of corn at $2 60 per barrel, making $1467 15. The Court charged, that, if the plaintiffs, on the 25th of March, delivered to the defendant, and he accepted the order for the corn, the property passed, and the subsequent loss by fire fell on the defendant. And, if the property did not pass by the transaction of the 25th of March, it did pass by the agreement of the 2nd of May, if the evidence was believed.

The defendant excepts to the charge; and we think there is error.

To entitle the plaintiffs to recover, the property of the corn must have passed to the defendant, so as to make it his corn when it was burnt. We think the property did not pass, either by what was done on the 25th of March, or on the 2nd of May: because the corn was not in a condition to be delivered. The 2822½ bushels were not separated from the bulk. It could not, therefore, be identified—it was not specific. The defendant could not tell what corn was his.

We are relieved from the necessity of discussing this question: because it is settled by several cases directly in point. *White* v. *Wilks*, 5 Taunton 176. The agreement was for twenty tons of oil in the vendor's cisterns, and, in point of fact, the cistern contained much more than twenty tons. Held at *nisi prius*, that no property passed; because the contract did not attach on any particular portion of the oil. The Common Pleas approved of the decision. One of the Judges says, "suppose a part of the oil had leaked out, can any one say whose oil it was?" So, in *Bush* v. *Davis*, 2 M. & S. 397. The agreement was for ten tons of flax at "Davis' wharf, by vrow Maria." The vendors had more than ten tons at "Davis' wharf by vrow Maria.' The King's Bench decided, that no property passed, although an order was given for ten tons and was accepted by the wharfinger. Le Blanc, J. says, "it was to be ascertained what goods the vendee was to have." Something was to be done to ascertain the *individuality*. *Blackburn on Sales* 124, 56 L. lib. 68, and the cases there cited. *Austin* v. *Craven*, 4 Taunton 644.

It was insisted, that, in this case, no measuring was necessary or intended to be made, and there was no reason, why the defendant should desire his corn to be separated from the bulk, until he made sale of it, and that the par-

ties intended by what was done to deliver the corn—to pass the property as an executed contract; and so, was distinguished from *Devan* v. *Fennell*, 2 Ire. 36.

It is true, when the property is specific and is in a condition to be identified and delivered, and the intention is proven to be, that the property shall *presently pass*, it does pass; although something remains to be due, as to put bows upon a wagon, which was sold and delivered, *Allman* v. *Davis*, 2 Ire. 12, or to measure, or to weigh, so as to ascertain the precise amount. For instance, if I sell *all* the corn in a certain crib at $2 60 per barrel, and it is the intention that the corn shall presently pass to the purchaser and become his property, it does pass, although it is necessary afterwards to have the corn measured to ascertain the amount and fix on the sum to be paid; because, supposing the thing to be in a condition to be delivered, the fact, that something remains to be done to ascertain the quantity and fix the amount to be paid, only raises a presumption, that it was not the intention of the parties, that the property should pass, until the weighing or measuring was done. *Devan* v. *Fennel*, 2 Ired. 36.—But this presumption may be rebutted, and the property does pass, if the jury are satisfied, that such was the intention. *Allman* v. *Davis*, 2 Ire. 12.

But it must be borne in mind, that this is only true in regard to such things as are *in a condition to be delivered.* If the corn is in bulk, so that there is no telling what corn in particular was sold, there the property does not pass; although it was the intention of the parties to consider it as delivered and that the property should pass. The intention may rebut a presumption, but it is impossible by an intention to change an *indefinite* into a *definite* thing. If I sell one hundred bushels of corn in my crib, which contains a thousand, although the purchaser pays me the money, and it is the intention, that the property therein shall presently pass to him, yet it does not pass;

because, it is *physically impossible.* It cannot be told what corn is his, until it is separated. The purchaser could not bring detinue; because he cannot describe the specific thing; and if any of the corn in the crib be stolen or damaged, before the one hundred bushels are delivered, can it be told whose corn it was? Or rather, would not the purchaser have a right to call for one hundred bushels of sound corn, the loss or damage to the contrary notwithstanding? The vendor should have required the vendee to assume the risk, when the corn was put at his disposal.

PER CURIAM. Judgment reversed and *venire de novo* awarded.

ALEXANDER McD. WILLIAMS & AL *vs.* JOSHUA BRYAN & AL

A bond, given by a person arrested on a *ca. sa.* for his appearance at Court, is required by our law to be made payable to the plaintiff in the execution; a bond, otherwise payable, for that reason alone, will prevent the Court from entering a summary judgment.

Where a person, arrested on a *ca. sa.*, gives a bond payable to A. B., who makes the affidavit for the *ca. sa.* and styles himself the agent of C. D. the plaintiff, no action can be maintained on such bond, in the name of C. D.; for he is not the obligee.

Appeal from the Superior Court of Law of Bladen County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

Alexander McD. Williams obtained a judgment against Joshua Bryan in Bladen County Court, for $11 91 debt, and $66 89 costs, and sued out a *ca. sa.* thereon, upon which Bryan was arrested by the Sheriff. The affidavit on which the *ca. sa.* was issued, was made by William H. White, who states therein that he is the agent of the plaintiff in that suit; and the sheriff took a bond from Bryan and two others, as his sureties, for his appearance, in the sum of $155 60, payable "to William H. White, agent for Alexander McD. Williams." The execution and bond were returned to the next term. But Bryan did not appear, and thereupon a motion was made against the obligors in the bond. But the Court refused it, and ordered the bond to be delivered up, and thereupon White appealed. In the Superior Court a motion was again made on behalf of Alexander McD. Williams for judgment on the bond, which was resisted on the part of both Bryan and his sureties. But the Court was of opinion, that, inasmuch as Bryan did not appear in the County Court, the suit was undefended, and therefore gave judgment in favor of Alexander McD. Williams, for the penalty of the bond, to be discharged by the payment of the debt and costs. The defendants appealed.

Troy, for the plaintiffs.
Strange, McDugald and D. Reid, for the defendants.

RUFFIN, C. J. The judgment cannot be supported.—The Act of Assembly directs the bond to be made payable to the plaintiff in the execution, and for that reason, if no other, there could not be a summary judgment on this bond. But, if that were otherwise, clearly Williams cannot have a judgment in his name on a bond payable to White, though White be therein stated to be his agent; for only an obligee can maintain an action on the obligation. It is true, the debtor cannot, after failing to appear,

adduce any matter of fact by way of defence. But that is not material to the present question; which is, whether the party, who moves for the judgment, shows a case on which he is entitled to judgment against the defaulting debtor. The case may be likened to a default in an action of debt, in which the declaration states a bond to A., without deriving any title from A. to the plaintiff; upon which, certainly, it would be erroneous to give judgment against the defendant, though in default. Here the creditor's own case—the bond, upon its face—showed that Williams could not have judgment on it in any form of proceeding—whether by action or motion. The default admits the whole case stated in the declaration, in the one case, or in the bond, in the other. But it admits no more, and does not authorise a judgment on the bond in favor of any person but the obligee. The judgment was therefore erroneous and must be reversed, and that of the County Court allowed to stand. The County Court ought not, perhaps, to have cancelled the bond. But if that were erroneous, it did not concern the present appellant, as he had no interest in the bond, in a legal sense, and had no right to appeal.

PER CURIAM. Judgment reversed.

DOE ON DEMISE OF BENJAMIN C. WILLIAMS vs. WILLIAM D. HARRINGTON.

A Court of Equity has a general jurisdiction to direct the sales of the estates of infants, wherever the purpose, for which the sale is directed, shall be deemed by the Court beneficial to the infants.

The decree in such a case cannot be impeached in any other case; neither upon the ground, that a guardian was not appointed by the proper Court, nor that there was not due advertisement or competent evidence of it, nor that the interest of the infant was not promoted by the sale, nor that, for any other reason, it was not a proper case for a sale, nor that the decree did not find the facts, which shewed the sale to be beneficial, nor upon any similar grounds.

Where a decree is made, on behalf of infants, for the sale of "the lands of the deceased debtor lying in Moore County," and a sale is made of several specified parcels of land, the sale ratified, and an order of the Court to convey to a particular purchaser, no exception can be taken to the general description of the land in the decree ordering the sale.

The Court has the power, with the consent of the reported purchaser, to substitute another person in his place; though, as a matter of wholesome practice, such a substitution ought not to be allowed, before the payment of the purchase money, nor, perhaps, without looking to the rights, even of third persons, as against the first purchaser.

Under an order of the Court of Equity for the sale of the real estate of infants, the deed of the commissioner appointed to make the sale, by virtue of the provisions of the Act of 1827, transferred to the purchaser the legal title.

The cases of *Harris* v *Richardson*, 4 Dev. 279, *Leary* v *Fletcher*, 1 Ire. 259, and *Jennings* v *Stratford*, 1 Ire. 404, cited and approved.

Appeal from the Superior Court of Law of Moore County, at the Fall Term 1850, his Honor Judge BATTLE presiding.

The premises descended from his father to the lessor of the plaintiff, while he was an infant, and the defendant claimed them under a deed to him from the Clerk and Master of the Court of Equity for Moore County. The whole question was on the validity of the defendant's title. The deed was made in 1833, and recites, that, at August term 1831, the Court by its decree commanded the Clerk and Master, after advertisement, to sell certain lands belonging to the estate of Benjamin W. Williams, deceased, and that, by virtue of that decree, after due advertisement according to the decree aforesaid, the Clerk and Master set up the following tracts of land for sale to the highest bidder on the 29th day of November 1831, in said County, when Charles Chalmers, John B. Kelly, and Daniel McNeil, became the highest bidders for William D. Harrington, at the price of $1890, and that the said Harrington had paid the same. In consideration of the premises, the deed then purports to convey to Harrington, the defendant, the premises in fee, describing them by metes and bounds. In support of the deed, evidence was given on the part of the defendant, that, after the year 1835, all the original papers and records of the Court of Equity for Moore were burnt by accident, including the proceedings on which the recited decree was founded. And evidence was further given by witnesses, that, in 1831, a petition was filed in the Court in the name of the lessor of the plaintiff by one Charles Chalmers, as his guardian, which set forth in substance, that Benjamin W. Williams, the father of the lessor, had died seised and possessed of a large real estate and also entitled to a large personal estate; that he died very much indebted, and all the personal estate had been applied towards the debts, and that several large debts remained unsatisfied, among which was a large debt to one Mr. Haskill, on which judgment had been obtained, and the plaintiffs were about to sue out process to subject the

lands of the deceased debtor thereto: that if the lands should be sold for cash under execution, they would probably be sold at a great sacrifice, and that it would be for the interest of the infant heir, as well as beneficial to the creditors, that they should be sold on a reasonable credit under the decree of the Court of Equity: And the petition prayed that the Court would decree a sale of all the lands of the deceased debtor lying in Moore County, upon such terms and in such manner as to the Court might seem meet. Evidence was further given by witnesses, that testimony was offered to the Court, upon the petition, to show the necessity of the sale, and that the Court decreed the sale of the lands set forth in the petition as prayed for, and ordered the Clerk and Master to make the sale at auction on the premises, on certain terms therein specified, after advertising the same; but the witnesses stated, they were unable to recollect, whether the decree declared the facts upon which it was made. Evidence was further given by the Clerk and Master, that he duly advertised the sale in a newspaper printed in Fayetteville, according to the decree, and proceeded to sell the lands on the premises, when John B. Kelly became the highest bidder for the tract in controversy in this suit and was declared the purchaser and gave bonds for the purchase money: that he reported the sales to the Court of Equity, and the Court passed an order ratifying them, and directing the Clerk and Master to convey the lands to the purchasers upon the payment of the purchase money: and that afterwards Kelly paid the purchase money for this tract, and that under his direction and under an order also of the Court, he, the Clerk and Master, then made the deed to the defendant. The witness further stated, that all the proceedings were recorded. The counsel for the plaintiff objected to that part of the evidence respecting the advertisement in the newspaper, without

producing the paper. But the Court overruled the objection.

On the part of the plaintiff it was insisted, that Charles Chalmers was not duly appointed guardian of his lessor; and, in order to establish that, he gave evidence that his mother died soon after he was born, and afterwards his father resided in Moore County until his death in 1828; and that the lessor of the plaintiff lived with his father up to his death, and was then seven years old; and immediately afterwards he was taken by his maternal grandfather to reside with him at Chapel Hill, and that before he had been in Orange County twelve months, the said Charles (who was the maternal uncle of the lessor) was appointed his guardian by the County Court of Orange.

The plaintiff's counsel contended, that the defendant had no title under the deed, on the following grounds: that Chalmers was not duly appointed guardian and therefore had no authority to file the petition: that the Court of Equity had no power to order the sale of land upon the facts and for the objects set forth in the petition: that the decree did not declare the facts upon which it was founded: that the Clerk and Master had no authority to convey to the purchaser, and that his deed, therefore, was inoperative: that the defendant was not the purchaser, and therefore the Clerk and Master had no authority to convey to him, and the deed was inoperative: that the petition and decree ought to have described particularly the lands to be sold, and that they were not sufficiently specific in that respect. But the Court held, that neither of the grounds of objection was sufficient to invalidate the defendant's title; and, under directions to that effect, the jury found for the defendant, and the plaintiff appealed.

Strange, Reid and Mendenhall, for the plaintiff.

Winston, Sen., Haughton, Kelly and H. W. Miller, for the defendant.

RUFFIN, C. J. Most of the objections are untenable in themselves. But without considering them in detail, there are some general considerations, which apply to them all and show that they cannot detract from the defendant's title. It is not necessary to go back further than our own statutes, to find a general jurisdiction vested in the Courts of Equity of this State to dispose of the land, as well as the chattels, of infants, for their benefit. Those Courts were constituted in 1782, with all the powers and authorities of the Court of Chancery. By the act of 1762, the powers of the Court of Chancery, as to orphans' estates, are expressly saved. Then, the act of 1827, after reciting that doubts had been entertained, whether any Court could direct a sale to be made by guardians of the real and personal estates of their infant wards, except in certain cases specified in two previous acts, and that the best interests of infants sometimes demand, that such sales should be made in cases, to which those acts did not extend, enacts, by way of remedy therefor, that on the application of a guardian by bill or petition, setting forth facts, which, if true, show that the interest of the infant would be materially promoted by the sale of any part of the infant's estate, real or personal, the Court of Equity shall cause the truth of the facts to be ascertained, and may thereupon decree, that a sale be made by such person, in such way, and on such terms, as the Court in its wisdom shall adjudge. Then follow, in the next section, provisions, that the sale shall not be deemed valid, until it shall be ratified by the Court; and that the Court shall designate the person to make the title to the purchaser, and that no conveyance shall be made until the Court shall order it—with a provision also for investing the proceeds of a sale. A jurisdiction over any subject could not be more extensive than that of the Court of Equity, as confessed or recognised by the statutes quoted. If it were before doubtful, the Act of 1827 thus confers upon the

highest equitable tribunal, known to our law, full power to order the sale of the estates of infants, provided only that the Court shall think it for the interest of the infant in any way wnatever, as to pay debts, for partition, or more convenient management, or to produce greater profit, or any other purpose deemed beneficial by the Court. In the exercise of that power the acts of the Court are, therefore, not to be regarded as those of a Court, not possessing a general jurisdiction over a subject, but only a special one to proceed on a particular subject for certain specified purposes and in a particular way. The cases of *Harris* v. *Richardson*, 4 Dev. 279, and *Leary* v. *Fletcher*, 1 Ire. 259, are contrasted examples of the difference between such general and special jurisdictions, touching the very point now under consideration; namely, the powers of the Court of Equity and the County Court to authorise a guardian to sell his ward's personal property (over which those Courts have a general jurisdiction,) and the special authority of the County Court to order a sale of the infant's land under the act of 1789. That distinction is further illustrated by the case of *Jennings* v. *Strafford*, 1 Ire. 404; in which, also, the general rule is recognised, that the judgment or decree of a Court, having general jurisdiction over a subject matter, subsisting unreversed, must be respected, and sustains all things done under it, notwithstanding any irregularity in the course of the proceedings, or error in the decision. Supposing, therefore, that there may have been irregularities or even error in the Court of Equity, still the decree cannot be questioned in a Court of law for such causes. It is not for another Court to arraign the decree, or the orders confirming the sale and for the conveyance to the defendant, upon such grounds, as that the guardian was not appointed by the proper Court, or that there was not due advertisement or competent evidence of it, or that the interest of the infant was not promoted by the sale of

the land, or that for any other reason it was not a proper case for a sale, or that the decree did not find the facts which showed the sale to be beneficial. For, all those matters were necessarily the subjects of consideration for the Court of Equity, and must have been passed on in the cause, before the decree or order could have been made. Having been judicially decided, it cannot be averred, that they were not duly and rightly decided. It would be monstrous, if the title of a purchaser under the decree—who paid his money to the Court, and got his deed from the Court, as it were—could be impeached upon any such grounds. Therefore, all the objections must fail upon the principles mentioned, unless it be those which insist on intrinsic defects in the decree or orders, as not being in themselves sufficient to authorise a sale of the premises in dispute and the conveyance to the defendant.

The Court cannot suppose, that the petition and decree did not describe the land more particularly than "as the lands of the deceased debtor lying in Moore County;" for no respectable counsel would draw pleadings nor the Court decree in such terms. It was probably thus stated by the witness, because, after the destruction of the papers, they were unable to repeat the particular words or do more than give the substance. But, if it were otherwise, the decree, though less precise than usual, would not be so very vague as to be ineffectual, when taken in connexion with the subsequent proceedings. It would then be as particular as a *fieri facias* on a judgment against heirs, which runs against the lands descended from the debtor; and they are identified by the sale and sheriff's deed. Here any defect, as to the certainty of the land, is cured by the report of the master of the sales of the several parcels, and their ratification, and the order of the Court to the Master to convey this particular tract to the defendant. So it appears, that there could not be

a mistake as to the identity of the land intended and ordered to be sold, and that actually sold.

Cases were cited at the bar, in which the Court of Equity has refused to allow another person to be substituted for the purchaser reported; and it was thence inferred, that the deed was not properly made to the defendant. Those cases seem to have been all proper, and this Court agrees, that, as a matter of wholesome practice, such a substitution ought not to be allowed before the payment of the purchase money, nor, perhaps, without looking to the rights, even, of third persons as against the first purchaser: which is the whole extent of those cases. But although under those circumstances it may be against the course of the Court of Equity to discharge one bidder and take another, yet there is nothing in those cases intimating the idea of a defect of power to do so. In this instance it was done by the express leave of the Court, after the payment of the whole price, and an order was made for a conveyance to the substitute; and that is conclusive.

It is competent to the legislature to direct the mode of transferring the legal title upon a judicial sale under a decree, as it is on one under execution at law. It was very meet that some mode should be provided, as the decree itself only constituted an equitable title, and conveyances could not commonly be got from the owners by reason of their disability. It is at present the province of the Clerk and Master *virtute officii*. But at the period of this transaction it was not. The act of 1827, however, is express, that a conveyance shall be made to the purchaser, when the Court shall order it, and by the person who shall be designated by the Court. It is certain, then, that the estate at law was intended to be transferred by a deed, to be executed under the direction of the Court; and, in this case, the deed was thus executed, and, consequently, it passed the title to the defendant.

Per Curiam. Judgment affirmed.

WILLIAM H. WILLARD *vs* PATSEY BLOUNT.

In this State, land is taxed according to its fee simple value, and whoever is owner of the land for the time being is bound to pay the tax: as if an estate is limited to A. for life or for ten years, remainder to B. and his heirs, the valuation is assessed, without reference to this division, and each must pay the tax, during the time that he is the owner and enjoys the possession and pernancy of the profits.

It is otherwise in the case of landlord and tenant, *where rent is reserved*, for the rent is in lieu of the land, and the landlord is *in the pernancy of the profits of the land*: and if the tenant is compelled to pay the tax, he may recover from the landlord, or deduct the amount out of the rent.

Appeal from the Superior Court of Law of Beaufort County, at a Special Term in January 1850, his Honor Judge BATTLE presiding.

No counsel for the plaintiff.
Donnell and *Rodman*, for the defendant.

PEARSON, J. In September 1846, the defendant leased to one Watson a lot, at the corner of Water and Market streets in the Town of Washington, 22 feet on water and 50 feet on market street, for the term of ten years, to begin on the 1st of January 1847, *free of rent*, in consideration, that the said Watson would erect on said lot a building according to specifications, and deliver the said building to the defendant, her heirs or assigns, at the end of the term in good repair, natural decay alone excepted; and the said Watson covenanted for himself, and his assigns,

that, after the erection of the said building, it should be at all times insured at a valuation of not less than $2000 against loss or damage by fire, for the benefit of all persons having estates therein, with a condition of re entry, in case the covenants were not complied with.

In April 1847, Watson assigned his lease to the plaintiff, in consideration of $2050, Watson binding himself to erect the building according to his covenant with the defendant.

Afterwards taxes became payable by virtue of an assessment, authorised by an act of the legislature, passed at its session in 1846–47. These taxes, amounting to $13 20, were paid on a threat of distress, and under protest by the plaintiff, who demanded of the defendant the amount so paid, and, upon refusal, commenced this suit by warrant.

His Honor was of opinion, that the plaintiff was not entitled to recover. In this we concur.

By the Revised Statutes, ch. 102, sec. 1, it is provided, that a tax of six cents on *every hundred dollars thereof* shall be annually levied and collected from all real property, with the improvements thereon.

By the 2nd section, all real estate held by deed, grant, or lease, or by title of dower, curtesy, or otherwise, shall be subject to the payment of public taxes, except land of the University, houses set apart for divine worship, &c.

Land, then, is taxed according to its fee simple value, and whoever is owner of the land for the time being is bound to pay the tax. If the estate is divided by giving a particular estate to one—the remainder to another—as, if an estate is limited to A. for life or for ten years, remainder to B. and his heirs, the valuation is assessed without reference to this division, and each must pay the tax, during the time he is the owner and enjoys the possession and pernancy of the profits. According to this general proposition, the plaintiff, being the owner for the time

being, and enjoying the possession and pernancy of the profits, is bound to pay the tax.

The case of landlord and tenant forms an exception, *where rent is reserved;* for, the rent is in lieu of the land, and the landlord is in the *pernancy of the profits of the land.* the profit of the tenant being the fruit of his own labor. Hence, in such cases, the landlord is bound to pay the tax, and if the tenant be compelled to pay, he may recover from the landlord or may deduct the amount out of the rent. But in the case under consideration, no rent is reserved. The defendant receives nothing in lieu of the the land, and the entire profits are enjoyed by the plaintiff. He, then, does not come within the reason for making the case of ordinary tenants paying rent, an exception to the general rule.

Let us see how it operates. A vacant lot, worth say $200, is leased for ten years without rent—a building, worth say $2000 is erected upon it. The lessee enjoys the entire use and profits of the lot in its improved condition. The amount of the assessment, and, of course, the tax, is increased ten times. It is right, that the lessee, who has the whole profit, should pay the tax; for, in fact, the lessor has parted with his entire estate for the ten years and stands as a *remainder man*, and not as a landlord receiving rent.

It is said, the lessor will be benefitted by receiving the property in its improved condition at the end of the term. That is true, and then he will be bound to pay the tax; but, in the mean time, it is manifestly unjust to require the lessor to pay tax for what he has never enjoyed; and there is no mode of apportioning the tax, so as to show what ought to be paid for and on account of the original value, and what for the additional value; and upon the general rule, the plaintiff is bound to pay the tax.

The English cases give no aid in deciding this question, because the land in that country is assessed upon the an-

nual rent, and if it be not rented, upon such sum as it could reasonably be rented for, and the statute provides that, in case tenants are compelled to pay the tax, they shall have the right to deduct it out of the rent. 38th *Geo.* 3.

PER CURIAM. Judgment reversed.

JAMES SLOAN, ADM'R, vs. CYRUS STANLY & AL.

Where an execution is about to be levied by a constable, the debtor, if he has personal property, must shew it, and, if he does not, the officer commits no wrong by levying on the land in the first instance.

So, if it does not appear that the officer knew of the existence of the personal property, he is justifiable in levying on the real estate.

If an interlineation appears on the face of an officer's return, and there is no evidence to shew when it was done, the Court will presume that it was done before the return was made, when the officer had authority to alter his return.

Appeal from the Superior Court of Law of Guilford County, at a Special Term in July 1850, his Honor Judge DICK presiding.

This case was submitted to the Court on the following facts.

On the 4th day of August 1848, Aaron Mendenhall, as executor of Moses Mendenhall, dec'd, sued out four different warrants against one Israel Stanly, which were all returned before a magistrate, and judgment granted on the 8th day of September, 1848, amounting in all to about

the sum of four hundred and fifty dollars ($450.) Executions were issued on the same day, and levied on two tracts of land, and the levies were returned to November Term 1848, of Guilford County Court. After the levies aforesaid, and before November Term 1848, Israel Stanly, the defendant, died. At February Term 1849, the heirs at law of said Stanly were made parties defendants. At February Term, the Court ordered the lands to be sold, and *venditioni exponas* to be issued, from which order the heirs of Israel Stanly appealed to the Superior Court.

After the cases aforesaid were in the Superior Court Aaron Mendenhall died, and administration *de bonis non*, on the estate of Moses Mendenhall, was granted to James Sloan, the present plaintiff. In the Superior Court, the plaintiff moved for a confirmation of the order of the County Court, which motion was opposed by the defendants; 1st. Because the judgments were void, having been, as the defendants alleged, entered up more than thirty days, after the date of the warrants. 2ndly. Because the defendant had personal property, which ought to have been levied on, instead of the land. 3rdly. Because, the levies were fraudulent, and were interlined by the constable, after they had been returned to Court.

As to the first objection made by the defendants, the Court was of opinion that the first levy, if made on the 8th day of September, as it purported to be, was good, for by excluding the 4th of August, the day of the levy, and excluding five Sundays, the 8th of September would be the 30th day. As to the second objection, it appeared in evidence, that, at the date of the levy, Israel Stanly had personal property to the amount of $350, or more, but it was admitted by the defendant's counsel, that he had not personal property, to discharge the whole of the said judgments, and there was no evidence tending to prove, that the constable was requested by Stanly, to levy on the

personal property, or that the constable knew of the existence of the personal property. It was also proved and admitted that Israel Stanly, on the 28th of September 1848, conveyed the whole of his personal property in trust, to secure other creditors.

As to the second objection, the Court was of opinion, that the constable was authorized to levy on the land, because the personal property was not sufficient to discharge the four judgments, and therefore the levies were not void.

As to the third objection, it appeared by inspection of the levies, that the words, "goods and chattels," were interlined in each of the four levies, in a different colored ink. The Clerk of the County Court was examined; he stated, that he could not say whether the levies were now different, from what they were when they were first returned to his office: that after the papers were first returned to his office, the constable once or twice (by the consent of the clerk,) took the papers to counsel, and returned them again to the office. The defendants then proved by a witness, that on the day Israel Stanly was buried, he, the witness, informed the constable of his death. The constable remarked that he ought to have been there, and levied before his death. The Court, being of opinion that the defendants failed to prove that the levies were interlined after they had been returned to Court, and had also failed to prove that the levies were made after the death of Stanly, therefore ordered and adjudged, that the order of sale made by the County Court be confirmed, and that a *procedendo* issue to the County Court; from which orders, the defendants prayed for and obtained an appeal to the Supreme Court.

Morehead and Miller, for the plaintiff.

No counsel for the defendants.

Nash, J. We have examined the exceptions filed against the opinion of the Judge, who tried the cause, and concur with him in his judgment. The first objection is founded, we presume, upon the 7th section of the act of 1836. *It* directs, that "all warrants issued by a Justice of the Peace shall be made returnable on or before thirty days from the date thereof, Sundays excepted, and not after," &c. The warrant in this case literally complies with the act. It is directed "to any lawful officer to execute and return within thirty days, Sundays excepted." The exception is, that the judgment is void, because it was rendered or entered up more than thirty days after the date of the warrant. Looking to the substance, and not simply to the language, and the objection is, that the warrant was returned after the expiration of the time designated in the act and the judgment was then rendered. The warrant was dated on the 4th of August 1848, which was Friday, and the judgment obtained on the 8th of September. Supposing, that a judgment obtained before a magistrate, on a warrant returned after the thirty days, as stated in the act, be void, the question does not arise here; because, by allowing the four Sundays in August and the one in September, the warrant was returned on the 30th day.

The second objection is, that the defendant in the execution had personal property, which ought to have been levied on, and not the land. The case shows, that, at the time the judgment in this case was obtained, three others were given against the present defendant in favor of this plaintiff, amounting in the whole to $150. Executions were issued upon all of them, at the same time, and all placed in the hands of the same officer; and all of them were levied at the same time. The defendant in the executions had personal property, but not to an amount sufficient to satisfy them. The personal property was not shown to the officer, nor did he know of its existence.—

The Act of 1836, *Rev. Stat.* ch. 62, sec. 16, expressly recognises the personal property of a debtor as the primary fund for the satisfaction of a Justice's execution; nor is the officer at liberty to levy it on the land, but when no goods and chattels are to be found, or not a sufficiency to discharge it. This provision is for the benefit of the debtor, and when an officer is about to make a levy, if the debtor has personal property and wishes to save his land, he must show it. If he does not, the officer commits no wrong by levying on the land in the first instance. The fact, however, disclosed by the case, that the officer did not know of the existence of the personal property, or what is the same thing, that there was no evidence to prove that he did know it, is decisive of this objection—he could not levy on that, of whose existence he had no knowledge. Moreover, no possible injury could arise to the defendant in the execution or to his heirs, as the former had, before the return of the execution, conveyed away, by a deed of trust, all his personal property to secure debts of a greater amount than it was worth.

The third exception is, that the levy was fraudulent and interlined after it came to Court. The fraud consisted in the alleged fact, that, after the levy had been returned to Court, the officer had altered his return by interlining the words "for the want of goods and chattels." There is nothing in the case to show, when those words were interlined, whether before or after the return of the levy. The constable is an officer, whose official returns are made on oath; and, as, before he makes his return, he may alter it any manner he pleases, so as to present the truth, we are bound in common charity and justice to presume in this case, the alteration was made at the time when he could legally make it.

In what the fraud consists, of which the defendant complains, beyond the interlineation, we are not positively informed. We gather, however, from the close of the

Judge's opinion, that it was in the alleged fact, that the levy was made, after and not before, the death of Israel Stanly, the father of the defendants, and against whom the judgment was obtained. The case discloses no evidence, showing that the levy was ante-dated.

We concur with his Honor in the view, which he took of the case, and that there is no error in the proceedings in the County Court. The judgment is affirmed; and a *procedendo* will issue to the County Court of Guilford.

PER CURIAM. Judgment accordingly.

NOTE.—There were three other cases, at this Term, between the same parties, in which the same judgment was rendered.

JOSEPH BYNUM & AL. vs. MARK BYNUM & AL.

Although it be not error to refrain from giving instructions, unless they be asked for; yet the Judge, when he does give instructions, either of his own motion or at the party's, should give them in such a way, that they be not in themselves erroneous, or so framed as to mislead the jury.

In order to satisfy that part of the law, which requires the attestation of subscribing witnesses to a will to be *in the presence* of the testator, it is sufficient if the attestation be in the same room in which he is, provided it be not done in a clandestine, fraudulent way, which would not be in the party's presence.

Where two persons agree to make mutual wills, *it would seem*, that bad faith in the one, either in not making his will or in cancelling it after it was made, will not prevent the probate of the will of the other party.

Appeal from the Superior Court of Law of Randolph County, at the Spring Term 1850, his Honor Judge BATTLE presiding.

This is an issue of *devisavit vel non*, upon a script alleged to be the last will and testament of Martha Ward, deceased. It bears date, July 13th 1833, and has two subscribing witnesses, W. J. Fuller and W. Gates; and it gives to Nathaniel Ward, one of the brothers of Martha, her half of a tract of land, on which they lived, containing 670 acres, eight slaves, a bed and furniture, and all her other property. She died in 1834, and Nathaniel Ward then obtained probate in common form. But in 1848, some of the next of kin and heirs, who were infants at the probate, obtained an order for re-probate, under which the present issue was made up.

Evidence was given, that Martha Ward and her brother Nathaniel, (neither of whom had ever been married) lived together for many years, and worked their property in common; and that there was some agreement between them, that the longest liver should have the whole. At the date of the paper she was about sixty years of age. Fuller, one of the subscribing witnesses, deposed, that Martha Ward had mentioned to him, that she wished him to do some business for her, and that some time afterwards Nathaniel came for him and said, that he wanted him to go and *do* some business for him and his sister Martha: that he went to their house, and at the request of Nathaniel, he then wrote his will, giving all his property to Martha: that he thought, but was not certain, Nathaniel then requested him to keep his will: that Martha Ward was very sick and in bed, and that he then prepared a table near the head of the bed, in which she was lying, and there wrote her will: that Nathaniel was present, when Martha made her will, and assisted in giving him the names of her negroes: that, after he had finished the writing, he read it over to her, and she was raised up in bed and signed it, and then laid down again, and he and Gates subscribed it, as witnesses, at the table, at which it had been written, which was about two or three

feet from the bed: that she could see the table and the witnesses, while they were subscribing, but that he was not certain, from the position in which she was lying and of his arm, while he subscribed, that she could see the paper at that time: and that he thought another paper might have been substituted for that she signed, without her knowing it: that Nathaniel then left the house, and Martha exclaimed, "Oh! sisters Betsy and Polly," and began to weep: that, as he was leaving the place, after doing the business, he saw Nathaniel in the yard, and he asked him for his will and he gave it to him, and never saw it afterwards, though he had several times looked over the valuable papers in Nathaniel's pocket book: that he kept Martha Ward's will until her death: and that she had capacity to make a will. The other witness, Gates, deposed, that he was present when Fuller wrote the script, and that it was written at a table within two or three feet of the head of the bed, in which Martha Ward was lying, very sick: that she was raised up, and Fuller held her hand while she signed the paper, and that Fuller and he then signed as subscribing witnesses at the same table: that, while they did so, Martha could see them, but he was not certain that, from the position in which she lay, and of his arm, she could then see the paper, and he thought another might have been substituted without her knowing it: and that, though very sick, she had sufficient testamentary capacity.

Another witness deposed, that, one or two years after Martha's death, he saw, in Nathaniel's possession, a paper purporting to be a will, with two subscribing witnesses, one of whom was the said Fuller, and the other he could not recollect: and that Nathaniel took it up, and spoke of his sister Martha, and wept.

The Court instructed the jury, that, as to the formal execution of the script, it was not necessary it should be proved, that the party deceased actually saw the

paper at the time it was subscribed by the witnesses; but it was necessary she should be in such a situation, that she could see it, if she wished; and that, if the jury believed she could not see it at that time, it was not subscribed in her presence, within the meaning of the law. And the Court further instructed the jury, that, if Nathaniel Ward induced his sister Martha to make a will in his favor by making his in her favor, and intended at the time to destroy his as soon as he obtained hers, and he did destroy it in her life time, it would be such a fraud in procuring the script as rendered it a nullity.

The jury found against the script altogether. The propounder then moved for a *venire de novo*, because the script, according to the evidence, was so subscribed in the presence of the party as to make it a good will to pass the real estate, and, at all events, it was sufficient to pass the personalty; and because there was no evidence to be left to the jury, that there was any such fraud as that supposed in obtaining the script, and that, if there were, it would not invalidate it as a will. The Court refused the motion, and stated, as a reason for doing so in respect to the paper as a testament, that, though the counsel for the propounder insisted in general terms before the jury, that the script was properly executed, and read it throughout, yet he did not particularly call the attention of the Court to the date, nor to the distinction between its execution as a will disposing of realty and personalty.

Miller, McRae and Kelly, for the plaintiffs.

Haughton, Mendenhall and W. H. Haywood, for the defendants.

RUFFIN, C. J. As the paper was executed before 1840, attestation was not necessary to its validity as a will of personalty; and probably the presiding Judge would not have allowed a mistake of that kind—arising from a mere

slip of his memory or attention—to prejudice the party, and would have granted a new trial, but for the desire to have the litigation put into a way to be terminated by having the other points decided. The Court thinks, however, that the propounder could not only ask for a new trial, but that he is entitled to a *venire de novo*, for error in that part of the instructions. The propounding of the script, as disposing of both kinds of property, and reading it through to the Court and jury, and insisting in the argument that it was well executed to all the purposes involved in the issue, it would seem, sufficiently presented the distinction between the execution of wills and testaments, in 1833, to make it incumbent on the Court to inform the jury of the distinction, if the Judge undertook to give any instructions at all on the points of attestation and execution. Although it be not error to refrain from giving instructions, unless they be asked, yet care must be taken, when the Judge thinks it proper, of his own motion or at the party's, to give them, that they be not in themselves erroneous, or so framed as to mislead the jury. Such care was not taken here; for the instruction given, unaccompanied by any qualification or explanation, may have left, and probably did leave, the jury under the impression, that attestation in the presence of the party was requisite to give validity to the paper for any purpose, and may have prevented it from being sustained as a testament.

But, upon the other points, the Court also deems the directions erroneous, considered in reference to the evidence, on which they were given. It is true, the terms, "in the presence," and "within view," are considered generally synonimous; because the sight of the testator is the best means of preventing the fraud, within the province of the act. But they are not perfectly so; for a blind man may make a will. Besides, as the Court here said, actual view is never necessary, but it is sufficient if

the party might see the witness attest, though in a different as well as in the same room. For, if actual sight were requisite, it would vitiate a will, as was mentioned in *Sheers* v. *Glasscock*, 1 Salk. 688, if a man did but turn his back or look off, though literally present by being at the spot where the thing was done. But when the witnesses attested in the same room in which the testator was lying in bed, it was good, though the curtains of the bed were closed; because it was in his power to see them, and therefore it was construed to be done in his presence. *Davy & Nicholas* v. *Smith*, 1 Salk. 395. It is not, therefore, the feasibility of obtaining another paper, which will avoid the attestation, when all passes in the same room, so that the party has opportunity of watching for him or herself; for under those circumstances the attestation is *prima facie* good. It is true, it is not to be taken to be conclusively good. The Chancellor in *Longford* v. *Eyre*, 1 Pr. Wms. 740, stated, that the bare subscribing by the witnesses in the same room did not necessarily imply it to be in the testator's presence; for it might be in a corner of the room in a clandestine, fraudulent way, which would not be in the party's presence. Yet in that case it was held, that the attestation by the witness in the same room, by the request of the party, could not be fraudulent and was sufficient. Those cases seem to be full authorities for holding, that this attestation, being done openly and without any clandestine appearance about it, but in the same room with the testatrix and within two or three feet of her, when she had her senses and nothing intervened between her and the witnesses, is good under the statute. It was done both literally and substantially in her presence: which is the safeguard provided by the law, and must be enough, though it may not exclude all possible chance of imposition.

The Court is not prepared to adopt the proposition, respecting the supposed fraud of the brother in procuring

this will and then destroying his own. No case is found like it. There was no misrepresentation of any matter of fact then passed or supposed to be existing. If it be supposed there was an agreement for mutual wills, it is not seen how the validity of the sister's will could be impeached upon the bad faith of the brother in cancelling his. If the agreement was in a form to render it valid, its performance could be enforced specifically by the sister had she survived. But she died first, and the destruction of the brother's will became immaterial, because it could not have operated, if it had not been destroyed. If there was no valid contract between them, then each knew that the intended bounty by will depended upon the pleasure of the other in revoking or not revoking his or her will. So that, looking at it in any light, it is not seen, how the supposed conduct of the brother could have rendered the sister's will a nullity, supposing it to be in other respects valid; as the preservation of her will would only argue, that she meant to carry out her engagement in good faith at all events, or that she had not changed her mind as to the object of her bounty. But there may, possibly, be more in it than strikes one at the first blush, and, as its decision is not necessary to the determination of this case, the Court declines the decision of it. For, supposing the law to be as laid down to the jury, there was not evidence, as we conceive, to the facts necessary to raise the point. It was but a remote inference from the evidence, that the sister, then aged and supposed to be *in extremis*, was induced to make her will in consideration of one in her favor by the brother. But admit that she may have been, there is no evidence that the brother contemplated, at the time, the destruction of his, nor that he did destroy it in her life time. His omission to produce it on the trial, fourteen years after her death, (which rendered it nugatory by the lapsing of the gifts) can authorise no inference against him. Of course, no reliance is placed

on the testimony of the witness, who speaks of seeing a will in Nathaniel's possession a year or more after Martha's death; because, as stated, he does not speak of it as purporting to be the will of the brother or of the sister, nor whether he knew the handwriting to the signatures, nor whether the paper was a copy or original. Indeed, that is evidence on the other side; whereas this question depends upon the defect of proof, by the caveators, of the fraud, which they allege and must establish. They offered no evidence to it but that of Fuller, and that is entirely deficient. He was under an impression, though not certain, that when Nathaniel executed his will he asked him to keep it—whether in the presence or with the knowledge of the sister, he does not intimate; and he said, that, as he was leaving the house, Nathaniel got the will from him, and he never saw it afterwards, though he had examined the valuable papers in Nathaniel's pocket book. It is singular, if any such understanding existed as to mutual wills to be kept by the witness, as is supposed, that such an immediate violation of it should not have made a permanent impression on the witness, and, indeed, that he had not communicated it to the sister. But, overlooking that, the observation is obvious, that the witness does not state that Nathaniel kept all his valuable papers in his pocket book, or that he professed to submit all of them to his examination, or, especially, that such examination occurred during Martha's life, which is the essential point. There is, in truth, nothing relevant to this matter, but a vague impression on the mind of the witness, that Nathaniel asked him to keep his will, and subsequently, on the same day, he took it into his own keeping; which affords no clue to an existing intention to destroy it, or to its actual destruction then, or at any time in his sister's life time. The case was, therefore, left to the jury to draw an inference of fraud against the party without any

evidence, that could in law or reason sustain the imputation.

Per Curiam. Judgment reversed and a *venire de novo*

SOLOMON HEATHCOCK *vs.* NELSON PENNINGTON.

The degree of care to be taken of a hired slave does not differ from that required as to other things.

It is erroneous to leave the question of due care to the jury; since it is the province and duty of the Court to advise them on that point, supposing them to be satisfied of certain facts.

Ordinary care is that degree of it, which, in the same circumstances, a person of ordinary prudence would take of the particular thing, were it his own; and it will differ much, according to the nature of the thing, the purpose, for which it was hired, and the particular circumstances of risk, under which a loss occurred.

If an owner hire out his slave for a particular purpose, it is to be understood he is fit for it, and, therefore, he may be set to that service, and kept at it, in the way that is usual. If there be risks in such service, it is to be presumed the owner must have foreseen them, and provided for them in the hire.

The case of *Biles* v. *Holmes*, 11 Ire. 16, cited and approved.

Appeal from the Superior Court of Law of Stanly County, at the Spring Term 1850, his Honor Judge Settle presiding.

The declaration states that the plaintiff hired to the defendant a negro slave between the ages of ten and twelve years, for the term of one year from, &c., with permission to the defendant to employ the slave in

driving a horse attached to a whim, at a certain Gold mine, belonging to the defendant, and that the defendant undertook and promised the plaintiff to take ordinary care of the said slave during the term; and that the defendant, not regarding his understanding aforesaid, wholly neglected and refused to take ordinary care of the said slave, and, by means of the negligence and improper conduct of the defendant, the said slave, while in the employment aforesaid, under the defendant, during the term and year aforesaid, viz., on, &c, fell into the shaft of the said gold mine, the same being 160 feet deep, and was killed and wholly lost to the plaintiff to the damages, &c. Plea, not guilty.

On the trial the plaintiffs gave evidence of the hiring. as stated in the declaration, and that the negro was of the age specified: that on a day in the month of January, the slave was put to driving the horse to the whim of the defendant's gold mine, at about 9 o' clock in the evening, with orders to continue the driving through the night until the next morning, under the directions of a young man, who was about 19 years of age and was employed as lander, as he is called, at the mouth of the mine or shaft. That the whim was about ten feet from the mouth of the shaft or pit, which was 160 feet deep, and at the surface 8 feet long, and 4 feet wide That the negro boy did not have an overcoat, but was allowed to warm himself at a fire, which was kept up about 21 feet from the mouth of the shaft: that upon one occasion, when he went to warm, which was just before day light in the morning, and when it was dark, the lander called to him and directed him to start his horse, and the boy, being drowsy, in attempting to go to his horse fell into the pit and was killed.

The defendant then offered evidence, that he employed a negro boy of his own, and his son, who were about the same age with the hired boy, in the same service to which

the plaintiff's slave was put; which was objected to on the part of the plaintiff, but admitted by the Court.

His Honor, therefore, charged the jury, that the defendant was bound to ordinary care of the hired boy: that his having employed his own son and slave in the same way with the plaintiff's negro was not a rule or standard, by which they should measure the care the defendants ought to have taken of the plaintiff's slave; because, if he did not take due care of his own family and property, that was no reason why he should not be chargeable for want of taking care of the slave he had hired. The Court then left it to the jury to say, whether the defendant had used ordinary care or not. There was a verdict for the defendant, and from the judgment the plaintiff appealed.

Strange, for the plaintiff.
Dargan for the defendant.

Ruffin, C. J. The degree of care to be taken of a hired slave does not differ from that required as to other things; and it was correctly so held on the trial. Indeed, the declaration lays the defendant's undertaking to be for ordinary care of the slave, and that the loss arose from the want of due care. It was, however, erroneous to leave the question of due care to the jury; since it is the province and duty of the Court to advise them on that point, supposing them to be satisfied of certain facts—*Biles* v. *Holmes*, 11 Ired. 16. Therefore the judgment would be reversed, if the verdict did not appear to be what it ought to have been, if the Court had given the proper direction. For, supposing all the evidence to be true—and as to that, there was no dispute—it did not establish, we think, a want of due care in the defendant. The jury therefore judged rightly, and their decision ought not to be disturbed.

Ordinary care is that degree of it, which in the same circumstances a person of ordinary prudence would take of the particular thing, were it his own. It is manifest, that it may differ very much according to the nature of the thing, the purpose for which it was hired, and the particular circumstances of risk, under which a loss occurred; a conch, for example, is not kept like a casket of jewels. So, a slave, being a moral and intelligent being, is usually as capable of self preservation as other persons. Hence, the same constant oversight and control are not requisite for his preservation, as for that of a lifeless thing, or of an irrational animal. Again, if an owner let his slave for a particular purpose, it is to be understood that he is fit for it; and therefore he may be set to that service and kept at it in the way that is usual. If he hire him, for instance, as a mariner upon a sea voyage, it is implied that he is to do the duty of a sailor. The ship's master, therefore, does the owner no wrong and evinces no want of due care by sending him for a useful purpose to the mast-head, though it happen that from want of experience or a steady head, he fall and be hurt. If, indeed, he were sent aloft in a tempest and forbidden to use the common means of security by lashing himself to the mast or rigging, that would make a difference. But surely the omission to give the slave particular instructions to use those ordinary means of preservation could not render the bailee liable, as for culpable neglect; since every one would confide in his understanding and disposition to take care of himself, as a sufficient guaranty for his using the ordinary precautions against the danger, naturally incident to the service. Moreover, the owner must have foreseen these risks and provided for them in the hire. These considerations tend to the conclusion, that the defendant here would not be liable, if the loss had arisen from a cause naturally connected with the employment, for which the slave was hired. For, it seems certain, that the plain-

tiff knew, that the whim, at which his slave was to work, must be within a few feet of the mouth of the shaft, and, from the depth of the shaft, that the operations of drawing off the water and raising the ore must go on night and day, and, of course, that the mouth of the shaft would not at any time be closed. The hazards of working near the open shaft, and in the night as well as the day, were the known hazards of the service. Why did not the plaintiff warn the boy of his perils from those causes? Because he did not conceive, there was the least necessity; and he ought not to complain, that the defendant omitted directions, which he thought unnecessary from himself. Unless the defendant, then, exposed the boy at an unreasonable time, or kept him at work for an unreasonable period, and the loss arose therefrom, he cannot be deemed negligent. It is stated, that the boy had no over coat.—But the state of the weather is not given; nor is it stated, that he was not otherwise sufficiently clad. Indeed, his condition in that respect is not pretended to have been the cause of his death, or connected with it, saving only that he may have been thereby induced to go oftener to the fire, and it happened upon the final occasion, when he went there, that he fell into the shaft. But admit that the boy would not have met with the fate he did, but for going to the fire, or if the fire had been in a different situation, yet it cannot be deemed gross negligence not to forbid the boy to go to the fire where it was, or not to have one in a different situation. The fire was between the boy and the lander, whose station is at the month of the shaft; and it is not stated that such was not its usual position, or that it was not a proper one. Apparently it was the most proper. It was there equally convenient to the lander and the driver of the horse: and in fact, it was, by its light, a better protection to the slave against accidentally stumbling into the shaft, as he passed near its mouth at every round on which he followed the horse,

than if it had been in a different direction. There was no such extraordinary hazard to the boys, who worked the whim, in going to the fire where it was, as to have induced the defendant to forbid them or to use any uncommon precautions, or give any particular instructions; for example, to keep that fire so as to give a light, or to make the fire in another place. It could not have been anticipated, that the boy was running any risk of falling into the shaft, which his own intelligence, at his age, would not prompt and enable him to avoid, considering him, as we must, as possessing the ordinary degree of intelligence and instinct of self preservation of persons of his age and class. Then as to the time of making the boy perform this service—that is, at night. As has been observed, it is to be inferred that the work could not be stopped during any part of the twenty four hours, without much loss; and that, in fact, it was the course of the business to keep at work. It is in that point of view, that the evidence, as to the employment of other hands in the same service and for the night as well as the day, was relevant and proper: not as excusing gross neglect as to one by a similar neglect as to others, but as establishing the usual and necessary duties of the employment, and as tending to establish the safety, with which it was attended, when pursued by others of no more years or discretion than this had, without any particular supervision. Some one had necessarily to perform this service at those times. Therefore it was not unreasonable, *prima facie*. It is not to be collected from the case, that the slave had been worn down by labour so protracted, as would ordinarily overcome persons of his age and condition by fatigue and heavy drowsiness, so as to deprive them of consciousness and the power of self control. On the contrary, we understand that this boy took his rest through the day, as it is stated, that in the evening he commenced his duty for the night—there being three of them, who performed the task among them,

and, probably, by turns. We cannot say that was unreasonable; at least, not so, in its bearing on the point now under consideration, namely, as ordinarily disqualifying a boy like this for taking care of his life by avoiding the shaft, as with his senses about him he would do; and thereby making it incumbent on a bailee, as an act of ordinary care, to stop him from work, or appoint a superintendent to keep him away from the shaft. If the defendant had, for example, sent the boy down the shaft, considering his inexperience and timidity, it would, doubtless, have been gross negligence not to provide against the accident of his falling, by making him fast to the bucket or chain. But with common bodily vigor and ordinary intelligence the boy was capable, after the repose of the day, of doing his business on the surface of the ground for the night, though near the shaft, without any probable hazard of getting into it; and, in the same degree, the vigilance of the defendant over his safety might be relaxed, without exposing him to the imputation of negligence, much less, gross negligence. The truth is, the event could not have been reasonably apprehended, and was not likely to result from the service, nor had any natural connexion with it. No one could suppose, that the boy, knowing the place and its dangers, would incur the risk of stumbling into the shaft by not keeping wide awake. It was his misfortune to resemble the soldier sleeping at his post, who pays the penalty by being surprised and put to death. The event is to be attributed to one of those mischances, to which all are more or less exposed, and not, in particular, to the want of care by the defendant.

Per Curiam. Judgment affirmed.

THE STATE *vs.* JOHN JOHNSON.

Where a charter has been granted for a turnpike road and the road opened the County Court has no right to convert it into a public road, unless the charter has been duly surrendered, or, from a *non-user* for twenty years, a dedication to the public may be presumed.

Even in such case the road can only be made a public road in the manner prescribed by the Act of Assembly. The mere appointment of an overseer will not be sufficient for that purpose.

The case of *Wilson* v. *Baker*, 3 Ire. 168, cited and approved.

Appeal from the Superior Court of Law of Yancy County, at the Spring Term 1850, his Honor Judge BAILEY presiding.

The defendant was indicted as an overseer of a public road for not keeping the same in repair.

Upon the trial, the jury found the following special verdict:

That there is a public road, leading from the County of Burke through the County of Yancy to the Tennessee line, and that the same has been used by the citizens for the space of nineteen years, that said road was made by Isaac T. Avery in 1829, by virtue of a charter granted him by the Legislature of North Carolina in 1827 and '28, which charter authorized said Avery to erect toll gates on said road when completed, and exact toll from persons travelling the same: that gates were put up and tolls collected for the first four years, but for twelve years past, the gates have been removed and no tolls taken: that the said Avery was willing and desirious to surrender said road to the County, it being an expense to him, and wished overseers appointed

by the County Court for the purpose of keeping the same in repair: that application was made to the County Court by citizens of the County, to appoint overseers over said road; that overseers were appointed accordingly and hands allowed to work said road: that the present defendant was appointed overseer over part of said road, a distance of about six miles; that the land over which the said road passes, belongs to the said Avery; that his hands, together with other persons, were allotted by the Court, to work under the defendant as overseer: that the said Avery acquiesced in the said appointment and allotment of hands, and his hands worked under the said defendant as overseer by the consent and approbation of the said Avery: that a part of the said road, leading from Burke County to the Tennessee line, passed over land belonging to other persons: that the defendant was duly notified of his appointment: that he has failed to keep the said road, over which he is overseer, in good repair, but suffered the same to become ruinous, miry, and in great decay, for want of due reparation and amendment.—But whether upon the whole matter aforesaid the said John Johnson be guilty of the misdemeanor in said indictment specified and charged upon him, the said jurors are ignorant, and pray the advice of the Court thereupon, and if, upon the whole matter aforesaid, it shall appear to the Court, that he is guilty of the misdemeanor, in manner and form as charged in the bill of indictment, the jury find him guilty—otherwise, not guilty. The Court being of opinion against the defendant, it was ordered and adjudged, that he pay a fine of five dollars. With which judgment the defendant being dissatisfied, prayed an appeal to the Supreme Court, which is granted.

Attorney General for the State.
Avery, for the defendant.

PEARSON, J. *Baker* v. *Wilson*, 3 Ire. 168, settles this case. There, certain engineers, in the service of the United States, had surveyed and marked out the line of a road, contemplated to be made by the Federal government. The government abandoned the road, and the County Court of Yancy, availing itself of the survey and location which had been made, passed an order, that the plaintiff, Baker, oversee the road, from the top of the mountain, &c., and assigned hands; among others the defendant, who refused to work, and was warranted for the penalty. The Court decided in his favor, on the ground, that the road had not been established according to law, a common public highway, which the inhabitants were bound to keep up. "GASTON, J. Our laws are explicit in requiring no new road shall be laid out, but by a judgment of the Court upon notice, and a petition filed, and allows an appeal by any person dissatisfied with the judgment. Rev. St. ch. 104, and secs. 2 and 3. These provisions would be substantially annulled, if the mere appointment of an overseer and assignment of hands to a supposed road were to be held, *per se*, a judicial determination that a public road be laid out when none before existed. Such an order may be *prima facie* evidence of the existence of the road, but it is competent for the inhabitants when sued, for refusing to work, or for the person appointed overseer, when indicted for not putting the road in order, to shew that there is no such road to be made or repaired."

The defendant is indicted as an overseer, for neglecting to keep the road in repair. He says there is no such common highway, and that the order in the County Court was void and of no effect. The facts are, that, in 1827, the Legislature authorised certain commissioners to lay off a road, which road was vested in Col. Avery for twenty five years, he undertaking to make and keep it in repair, for and during that time, in consideration of

the exclusive privilege conferred on him of taking tolls and owning it as a *turnpike* road. The road was accordingly made and gates erected and toll received for some four years, when Avery threw open his gates and allowed any one to travel along it who chose, and he expressed a willingness that the County might take it as a County road. This state of things continued for about 12 years, when, the County Court, without a petition being filed, and notice given as the statute requires, made an order, appointing the defendant overseer, and assigning hands.

We agree with the defendant, that this is not a common public highway, which the inhabitants are bound to keep in repair. It was chartered and originally made as a turnpike, and it has not been changed into a common County road, by any such proceeding, as the law requires. Avery, by *non user*, has subjected his franchise to forfeiture; but it is not in fact forfeited, and the right divested. That can only be done by judgment on *sci fa*: on the same principle that an estate of land can only be defeated by force of a condition upon *actual entry*. There has been no surrender of the franchise; that could only be, with the consent of the legislature, the grantor; and there has been no "dedication" of the road to the public. A dedication, like most other matters, can only be effectual with the consent of both parties. Avery we will suppose willing to make the dedication; still it has not been accepted by the proper authority, acting for and on behalf of the public; and admitting, that, had a petition been filed in the County Court, setting out a wish to dedicate, and praying that it might be established as a common public road, and due notice, with the right of appeal according to the statute, that the proceeding would have been effectual to make it a common public road; still *that has not been done*. And admitting that if the public had used it as a road and the County Court had so

recognised it, by the appointment of overseers and hands to keep it in repair *for twenty years*, which is the shortest time, that there would then have been the presumption of a dedication; still that has not been done, and so there has neither been an express nor an implied dedication. Several cases were cited, as to the manner of dedicating streets, by laying off and settling lots in towns. Those cases have no bearing, because the manner of establishing County roads, is expressly regulated and provided for by statute.

The case may be looked at in another point of view.—The franchise has never been divested out of Avery. Suppose the defendant had gone on and put the road in good repair, and Avery had then erected his gates, as he might have asserted a right to do; it would have presented a strange state of things! Or suppose the solicitor had sent a bill of indictment against Avery for not keeping his road in repair, as he had undertaken to do, for the term of 25 years, and that and the present indictment were called for trial at the same time—a strange state of things would have again been presented; and yet, there is no question, that Avery has, during all this time, been liable to an indictment. If he made a bad bargain or "missed his calculation," he ought to have petitioned the legislature to accept a surrender.

It was probably expedient to have this road, provided those who used it, would pay for making and keeping it in repair; but *non constat* that it is expedient to establish the road, if the labor of a sparse population is to be taxed to keep it up.

The judgment in the Court below must be reversed, and judgment for the defendant.

Per Curiam. Judgment reversed and judgment for the defendant.

JAMES C. TURRENTINE *vs.* THOMAS FAUCETT.

Where a sheriff arrested a man on a *ca. sa.* and committed him to jail, in custody of the jailor, and the prisoner escaped; *Held*, that, without a bond of indemnity, the jailor was only bound to the sheriff for want of fidelity or due care in the discharge of his duty.

A sheriff has a right to take a bond from the jailor to indemnify him for *all losses*, to which he may be subjected by the escape of a prisoner, while in custody of the jailor.

Appeal from the Superior Court of Law of Orange County, at the Fall Term 1850, his Honor Judge MANLY presiding.

In this case the following facts are agreed upon by the parties: That one Fleming was committed in due course of law, as a debtor in execution, at the instance of Boaz Adams in one case, and of John P. Mabry in another case, to the custody of James C. Turrentine, the plaintiff, as the sheriff of Orange County, and he delivered the said Fleming to the defendant, Faucett, the jailor of said County; and he remained in close prison until the night of the 1st of November 1844, when he made his escape by his own act, assisted by some one from the out-side of the prison, by cutting through the iron bars of the window, but without the knowledge or consent or actual negligence of the defendant. The plaintiff was sued for an escape, as sheriff, in an action of debt, by both Adams and Mabry, who effected recoveries against him for their debts against Fleming. And on the 30th day of August 1849, he paid said Adams the amount of his judgment against him for

said escape, viz: $3630 69, and for costs of said suit $71 43. And on the 30th day of August 1849, he likewise paid the said Mabry his said judgment, viz: $620, and for costs of said suit $80 82: that on the same day he paid to his own attornies in the said two suits $310; and in expenses in attempting to arrest the said Fleming, $62 50: that the said Turrentine commenced an action of assumpsit for said escape against the said Faucett, as jailor, on the 15th day of October 1847, in Orange Superior Court; and at March Term of said Court 1849, the said plaintiff was non suited therein, and judgment of the Court was rendered against him: and that afterwards, the said Turrentine, on the 30th day of August 1849, commenced the present action for the same cause of action against said Faucett, as jailor: that the said Faucett was jailor and the said Turrentine sheriff on the 1st of November 1844, when the said Fleming made his escape. Upon this state of facts, the Court was of opinion, the plaintiff was not entitled to recover, and instructed the jury, that while the action was believed to be in time and not barred by the statute, yet upon the other plea, the plaintiff could not recover. There was a verdict in accordance with these instructions.

Rule discharged; judgment, and appeal.

W. H. Haywood and J. H. Haughton, for the plaintiff.

J. W. Norwood and J. H. Bryan, for the defendant, submitted the following argument:

The action is assumpsit, upon the implied undertaking of the defendant as jailor.

The common law only implies an undertaking for reasonable care, diligence and fidelity. 1 *Com. Cont.* 222. *Buc. Ab.* master and servant, M., *Story on Agency* 172, 182. *Atterton* v. *Harward*, Cro. Eli. 349. *Kain* v. *Ostrander*, 8 Johns. R. 209–10.

At common law the action against the sheriff for an escape, whether voluntary or negligent, was case; it was regarded as a breach of duty and a *tort*. The same principles apply to the action of debt against the sheriff upon the statute; it is still regarded as a *tort*—the action is founded "in *maleficio*." 2 *Bac. Ab. Escape* 525, letter F.

The sheriff is subjected upon grounds and for reasons of policy which do not apply to the jailor. His (the jailor's) is only a common law liability, so that upon the action against him, actual negligence must be proved and actual damage shewn. If the sheriff wishes an *indemnity* from his jailor, all the old books say he must take a bond from his deputy, whereby his common law liability will be altered and his responsibility enhanced.

The responsibility of the sheriff has been assimilated to that of a common carrier, (the owner of a ship for instance,) who is subjected upon grounds of policy for all losses, except those occasioned by the act of God or the public enemy, yet his servants and agents are only responsible to him for reasonable care and diligence and skill.

If the jailor were considered a wrong-doer and liable in the same degree and upon the same principles as the sheriff, yet the general rule is, that there is no contribution between wrong-doers, 29 *E. C. L. R.* 37, and *indemnity* stands on the same ground. *Merryweather* v. *Nixon*, 8 T. R. 186.

Pearson, J. One Fleming, who was in jail under a *capias ad satisfaciendum*, escaped. The plaintiff was sued, as sheriff, and forced to pay a large amount to the creditors, and brings this action against the defendant, his jailor, and declares upon an undertaking to keep the said Fleming faithfully and securely, and on failure to indemnify and save the plaintiff harmless from all loss or

damage. It is stated in the case agreed, that Fleming made his escape without the knowledge or consent, or *actual negligence* of the defendant.

The defendant by his counsel admits, that there was an implied undertaking to keep the prisoner faithfully and diligently, but denies, that the law implies an undertaking to keep *safely* or *to indemnify*.

The Judge in the Court below so decided. To this the plaintiff excepts. There is no error.

For the plaintiff it is said, the sheriff is by law bound to keep prisoners *safely*. The defendant, when he undertook to act as jailor, must be presumed to have done so with reference to this liability of his principal; hence, there is an implied undertaking on his part, so to act as to prevent his principal from being subjected to loss; or, in other words, there is an implied undertaking to keep safely or indemnify.

For the defendant it is said, the general rule is, that agents, servants, and bailees, where the contract is for the benefit of both parties, are only liable for ordinary neglect. In the case of sheriffs, common carriers, and innkeepers, an exception is made; they are held liable as *insurers*, except against "the act of God, and the King's enemies," upon the ground of *public policy*. This reason does not extend to their deputies, agents and servants.—Therefore, the latter do not fall under the exception, but stand under the general rule.

The argument for the plaintiff clearly shows the expediency of taking a bond of indemnity, (as sheriffs usually do.) But if he neglects to do so, *non constat* the law will imply an undertaking to keep prisoners safe or indemnify. An undertaking to act faithfully and diligently, is implied by law. This, the jailor is *able to do*, if he will. But when it comes to *insuring*, that prisoners will be kept safely, and indemnifying against acts beyond the control of the jailor, and which do not fall within the reach of

ordinary diligence, it is clearly a different question. This higher obligation, which the law, from motives of public policy, imposes on the superior, can only be imposed on the inferior by an express undertaking. Public policy is satisfied by holding the superior responsible. As between him and his jailor, the general rule applies, unless there be an express agreement to indemnify.

To illustrate: a rail road company, as a common carrier, is bound to insure every article bailed to be carried; because, public policy requires it, and it is presumed the rates are fixed in reference not only to the trouble of carrying, but to this liability.

This policy does not extend to the conductor of a train, and there is no presumption, that he has undertaken a higher degree of responsibility, than that which is imposed by the general rule, in the absence of an express undertaking to that effect, in consideration of higher wages.—So, although the company be chargeable, as a common carrier, he is not liable over, without proof of a want of ordinary care.

It is suggested, that if this liability is not implied by law, it is unlawful to take a bond of indemnity and such bond is void; and that the real purpose of taking these bonds is not to add to the liability, but to increase the security.

It is against law to take a bond of indemnity, and thereby encourage or permit an unlawful act—as to give a stranger a key and free access to the jail. But an indemnity from the jailor is an inducement to make him more strict and vigilant in the discharge of his duties. Sheriffs have, for this reason, always been allowed by bond or express undertaking of jailors and deputies, to raise the responsibility of the inferior to the same degree as that imposed on the superior.

The practice of taking bonds has been so uniform, that we have not been able to find a single case like the pre-

sent. There is, however, an old case, in a report of high authority, which fully sustains our conclusion.—*Atterton* v. *Harward*, Croke Eliz. 349. That was case by a bailiff against a debtor for making his escape, whereby the creditor recovered of the sheriff, and he of the bailiff, on his assumpsit to save the sheriff harmless against all escapes; and so the bailiff sought to recover of the debtor, for making his escape, by which *tort* he had been subjected to damage. Upon not guilty, it was found against the plaintiff. The Court was of opinion, "that the bailiff was not chargeable to the sheriff by law, but by *his assumpsit*, and this being his voluntary act, shall be no cause to charge the defendant, but shall make himself liable." But they argued, "if the bailiff had been chargeable *by law*, without *such promise*, an action did lie for him against the defendant, who caused him to be charged."

Upon the authority of this case, in *Kain* v. *Ostrander*, 8 John 207, it is said, "the usual course is to resort to his bond of indemnity, and if he has omitted to take one, the jailor is only answerable on his implied undertaking to serve the sheriff with diligence and fidelity." And the decision is in favor of the jailor, on the ground, that there was no evidence of that *culpable neglect*, which is requisite to make a jailor liable.

PER CURIAM. Judgment reversed.

NOTE.—In consequence of the indisposition of Judge NASH, very few opinions were delivered by him at this Term.

GENERAL ORDER.

Students, preparing to be examined for a Superior Court Licence, are required hereafter to read ADAMS' DOCTRINE OF EQUITY, instead of FONBLANQUE.

APPENDIX

STATE *vs.* JOHNSON.

The following dissenting opinion of NASH, J., *should have been inserted at page* 651.

NASH, J. The consideration, which I have been able to give to this case, leads me to a conclusion different from that to which a majority of the Court have come. From the facts set forth in the special verdict I am of opinion, that the road, over which the defendant was appointed overseer, was at the time of his appointment a public road or highway, duly constituted; and that the defendant was bound to keep it in the repair required by law, and for neglecting to do so, he was guilty of a misdemeanor and punishable by indictment. Originally, the road was a turnpike, erected under the authority of an Act of the General Assembly of the State. It was completed in 1830, toll gates erected and the proper tolls exacted from those bound to pay them. At the end of four years, the gates were removed by the grantee of the franchise, and the road thrown open to the public, and so continued for twelve years, the citizens of the country, for all that period, passing and repassing as over any other public highway. At the end of this time, the County Court, at the instance of a portion of the citizens of the County, and with the knowledge of the grantee, appointed the defendant overseer of that portion of the road embraced in the indictment. The whole of the road lay within the County of Yancy. The objection is, that the County Court had no power to constitute this road a public road, in the manner, in which it was done, and that, therefore, the ap-

pointment of the defendant, as overseer, was void and of no effect. If the first proposition fails, the second follows, of course, its fate.

There are three modes known to our law, by which a public road may be established—by dedication, by an uninterrupted use of it by the public for twenty years, and by the mode pointed out for legislative acts. The two first are by the common law, and have been repeatedly recognized by the decisions of the Supreme Court.—*Woollard* v. *McCullock*, 1 Ire. 436. *State* v. *Marble*, 4 Ire. 320. *Smith* v. *Harkins*, 3 Ire. Eq. 622. When the road, in this case, was finished by the grantee, according to his contract, he acquired in the land over which it ran, for the term specified in his charter, a legal interest, which was liable to the payment of his debts, and if sold under execution against him, the purchaser would acquire a valid legal title to the interest owned by him. In such case, the ownership of the land or road would be separated from the franchise, which would still remain in the grantee, for it could not be sold. *State* v. *Rives*, 5 Ire. 297. This property or interest in the land or road was susceptible of being dedicated by the grantee to the public; for, in *Smith* v. *Harkins*, his Honor the Chief Justice, in delivering the opinion of the Court, states it as a plain principle, that "private persons may dedicate their land or other property to the public." Here, the owner of the turnpike road abandoned it to the public, by removing his gates and suffering the public to pass over it free of toll. It is true, that no use, short of twenty years, will raise a presumption of a dedication; but here there is no room for a presumption—the case states he did abandon it to the public use, which *is* in itself a dedication. There is no form, by which a dedication shall be made, pointed out in the authorities; and I can conceive of no other better adapted to the purpose, more expressive of the intention of the grantee, than the one adopted by him, more

especially as the land itself, over which the road ran, which is embraced in the indictment, was his freehold. I admit, that the grantee here could not, of his mere action, by such an abandonment of the road, strip from his own shoulders the obligation of keeping the road in repair and throw it upon the public. Something more was necessary—the public, through its constituted authorities, must accept the road. This, I hold, has been done by the Connty Court of Yancy, in appointing overseers over the road. In *Smith* v. *Harkins*, it is declared by the Court, that "the making and regulating roads, fences and bridges are the proper subjects of political action and are *necessarily* governed by the will of the law making power, or of those, to whom it may be delegated," p. 622. This is said in reference to the claim by the defendant in that case to erect a free bridge and dedicate it to the use of the public. The Court admit the principle, but qualify it with an exception, "but not so as to injure or impair exclusive rights, previously granted by the public. To authorise such interference they must show the *acceptance* thereof by the regular organs of the community, the constituted authorities;" and at page 620 they show, that the constituted authority meant in that case was the County Court. And such is the spirit and meaning of the legislative acts of our State. It is said, however, that this is not an open question—that the case of *Baker and Wilson*, 3 Ire. 169, is decisive of it.—To my apprehension, that case does not justify the conclusion, which is drawn from it. That conclusion is, that the County Court of Yancy could not, by their acceptance of the road in this case, constitute it a public road—that, in order to constitute it such, by their action, the directions of the act of 1784 must be pursued; nor would it have been an authority in this case, if it had so decided. The facts in the two cases are essentially different. What were they in the former? The Government of the Uni-

ted States, by its agents, had surveyed and marked out a line of road, *contemplated* to be made under its authority; but no such road was opened; and the County Court, acting upon the idea, that the survey constituted a public road, appointed the defendant an overseer upon it. The Court decide, that the appointment of the overseer was void; and the opinion shows clearly why it was so. His Honor Judge GASTON says: "Our laws are explicit in requiring that no *new* road shall be laid out, but by a judgment of the Court upon petition filed." "These requirements, (that is, as set forth in the 2nd section of the act of 1784,) would be substantially annulled, if the mere appointment of an overseer or assignment of hands to a *supposed* road were to be held, *per se*, a judicial determination, that a public road be laid out, where *none existed before*." In speaking of the liability of the overseer and hands, the opinion concludes, "But neither the one nor the other have failed in the performance of duty in regard to a public road, if it appear, that such road has no existence either in law or in fact." This opinion, as I understand it, establishes this proposition, and no other, that when there is no road in existence, no road *de facto*, the *County Court* cannot lay off or establish a *new* road on land previously granted without pursuing the requirements of the act of 1784. If the decision had the effect now attributed to it, it would be a virtual abrogation of the common law mode of establishing public roads; and that would be directly in conflict with the opinion of this Court in *Woolland and McCullock*, where it is decided, that the common law modes of establishing public roads are not repealed by our Statutes or any of them. In this case, there was a public highway in existence, when the order was made appointing the defendant an overseer over it —a road established by the highest authority known to the law in the establishment of roads, and which had been used by the public for twelve years as a public road.

To such a state of facts, the case of *Baker* v. *Wilson* does not apply, nor could the Court have intended it should. Suppose the road had been kept up as a turnpike, until the expiration of the charter, and either the Legislature had refused to re charter it, or the owner did not desire it; or suppose, that the owner of the franchise had, after erecting the road, forfeited it, and by due course of law the charter had been repealed—or suppose the owner of a tract of land, adjoining the town of a newly established County, opens a road through it to the town and gives it to the public—can it be pretended, that in either of these cases, the County Court cannot adopt the road, as a public road, without a petition regularly filed and a jury? Where the necessity of a petition—the road is already in existence? Where the necessity of a jury —it is already laid off? Whether the public interest or convenience requires a public road there, the County Courts are the exclusive Judges. The language of the acts of 1784 and 1813 strongly sustains I think, the view taken by me. It is, "the Courts of Pleas and Quarter Sessions shall have full power and authority, &c., to order the *laying out* of public roads," &c., evidently showing, that the provisions in them extended only to the establishing of *new* roads. But it is further said, the owner of the franchise could not surrender it to the County Court. Let that be so. It is not necessary in my view to decide that question here. The freehold in land may be in one person, and a right of way over it in another. The ownership of the road and franchise are separate and distinct interests are governed by separate and distinct rules. In conclusion, I can but repeat, that, in my opinion, the dedication of the road in question was complete so far as the owner of it was concerned, when he removed his gates and abandoned it to the use of the pubic, for it is rather the intention of the owner, than the length of time of the use, which must determine the fact of dedication;—

Woolidge on Ways, *p.* 11, and 11 *East* 376; and that the County Court had the power to accept the dedication, and by the appointment of overseers did accept it. I consider the opinion of the Court in this case, as materially shaking the authority of those previously made by the Court, on the subject of public roads.

ERRATUM.

PAGE 413—10th line from bottom—read "*count*" for "*Court.*"

INDEX.

ACCOUNT, ACTION OF.

1. In the action of account there are two judgments; first, that the plaintiff and defendant account together; secondly, that the plaintiff or the defendant recover the balance found to be due from the one to the other. *McPherson* v. *McPherson.* 391
2. In order to obtain the first judgment, it is not necessary for the plaintiff to shew that the defendant is indebted to him as bailiff, &c. He need only shew that he is bound to account with him as bailiff, or as a tenant in common, who has been in the pernancy of the profits, and the right to this judgment can only be barred by proof on the part of the defendant that he has already accounted, or by a denial, uncontradicted on the part of the plaintiff, of the existence of any such relation between the parties as gives the plaintiff a right to call for an account.—*Ibid.*
3. Where there are several tenants in common, some of whom have been in the receipt of profits and some not, each of the latter must bring his own action of account for what he claims —they cannot bring a joint action in the names of two or more, to recover their several shares. *Ibid.*
4. So where several tenants in common receive the profits, unless it can be shewn that they received them jointly as partners, an action of account cannot be brought against them jointly, but each must be sued separately. *Ibid.*
5. If either of these cases appear upon the trial, the Court will order a nonsuit. *Ibid.*
6. Every tenant in common, who has been in the enjoyment of the property, is liable to account; and it is not material what was the mode of enjoyment, whether he used it merely for shelter, or as a means of supporting himself and family, or made money by selling the products, or received money as rent. *Ibid.*

ACTION ON THE CASE.

1. As soon as the owner of

an animal knows or has good reasons to believe, that he is likely to do mischief, he must take care of him and be responsible for any injury that he may inflict; and it makes no difference, whether this ground of suspicion arises from one act or from repeated acts. *Cockerham* v. *Nixon*, 269

2. The act done, however, must be such as to furnish a reasonable inference, that the animal is likely to commit an act of the *kind complained of*: this is a matter to be decided by the jury and not by the court.—*Ibid.*

3. In an action on the case, a count in deceit, for knowingly misrepresenting the soundness of a chattel, may be joined with a count for the breach of a warranty of the soundness of the same chattel. *Lassiter* v. *Ward*, 443

4. The degree of care to be taken of a hired slave does not differ from that required as to other things.—*Heathcock* v. *Pennington*, 640

5. It is erroneous to leave the question of due care to the jury; since it is the province and duty of the Court to advise them on that point, supposing them to be satisfied of certain facts. *Ibid.*

6. Ordinary care is that degree of it, which, in the same circumstances, a person of ordinary prudence would take of the particular thing, were it his own and it will differ much, according to the nature of the thing, the purpose, for which it was hired, and the particular circumstances of risk, under which a loss occurred. *Ibid.*

7. If an owner hire out his slave for a particular purpose, it is to be understood he is fit for it, and, therefore, he may be set to that service, and kept at it, in the way that is usual. If there be risks in such service, it is to be presumed the owner must have foreseen them, and provided for them in the hire. *Ibid.*

ADMINISTRATORS.

See Executors and Administrators.

ADVANCEMENT.

See Intestate's Estates.

AGENT AND PRINCIPAL.

1. Where A, a citizen of North Carolina, appointed B. in Tennessee to lease for him a certain tract of land in the latter State, and B. accordingly leased it, but the lessor, not being willing to trust A., required B. to give his own note for the rent, which he did and afterwards paid it; *Held*, that this was an undertaking by B. within the scope of his general author-

ity; that A. was bound to reimburse him, and that it was not necessary for B. to give A. any notice of the payment, to entitle him to an action against A. for the money so paid. *Irions* v. *Cook*, 203

3. One, who has only a verbal authority to sell a slave, can transfer the title by a sale and actual delivery.—*Osborne* v. *Horner*, 359

See Reward. Demand.

APPEAL.

1. An appeal will not lie from the decision of the County Court, upon a petition for draining the petitioner's lands, through those of others. *Stanly* v. *Watson*, 124

2. Where there is a judgment against two or more, an appeal cannot be granted unless all the defendants join in the appeal. *Kelly* v *Moye* 182

3. An appeal will not lie to the Superior Court, from the decision of the County Court, on a petition, by an alleged lunatic, to have the verdict of an inquest in his case set aside, and the guardian appointed in pursuance thereof removed.—*Ray* v. *Ray*, 357

4. Where three are sued in debt, and one of the defendants, not contesting the plaintiff's right to recover, pleads that he is a co-surety of one of the other defendants, and a verdict is found against him, it is very doubtful whether he can appeal at all; but certainly not alone. *Loftin* v. *Kornegay*, 437

See Executors and Administrators. Evidence.

APPROPRIATION.

See Contract.

ARBITRATION AND AWARD.

1. Tenants in common agreed to a division of their land, and covenanted that it should be referred to A. and B. to value their respective parts, and that the party refusing to abide by the award should pay a certain sum, as *stipulated damages*, and not as a penalty. The covenant further provided, that "the valuation should be made upon such examinations and surveys, as the referees might think proper, of which they were to be the sole and exclusive judges." The award having been made and one of the parties objecting, *it was held*, upon a suit for the stipulated damages, that the award was good, notwithstanding but one of the referees made the survey, the other relying upon such survey and on his own previous knoweldge of the land, the referees having, by the terms of submission, a discretionary power to

make such surveys as they might think proper. *Devereux* v. *Burgwin*, 490

2. *Held*, further, that the award cannot be impeached in a *Court of Law*, by shewing that it was procured to be made, unfairly and by the exertion of undue influence. *Ibid.*
3. *Held*, further, that the award cannot be impeached by shewing, that, after the submission, one of the arbitrators had become addicted to intemperance, to such an extent as to impair his mind, unless it be further shewn, that, at the time he made his award, he was so drunk as not to know what he was doing, or his intemperance had been carried to such an extent, as to reduce him to a State of *fatuity*, so that he had no mind. *Ibid.*
4. These two last conclusions do not apply to cases, where the award is made under a rule of Court. There, the Court retains a supervising power, and will see that the award was not obtained by unfairness or undue means, when a summary judgment is moved for.—*Ibid.*

ASSAULT AND BATTERY.

1. Whether, when a man presents a pistol at another, threatening to shoot, and the pistol is not loaded, he is guilty of an assault, may admit of some question, but the man charged, clearly, cannot be excused, unless he proves that it was not loaded. The State is not bound to prove that it was loaded. *State* v *Cherry*, 475
2. Insolence from a free person of color to a white man will excuse a battery, in the same manner, to the same extent, as in the case of a slave. *State* v *Jowers*, 555

ASSUMPSIT.

1. Where A. sold to B. a tract of land, conveyed to him by a deed containing a covenant for quiet enjoyment, and, upon discovery that a part of the land previously belonged to B., A. offered to pay to B. the value of this part of the land, so as to avoid a suit on the covenant, *Held* that an action of assumpsit would not lie on this proposition, because B. had not acceded to it.—*Burns* v *Allen*. 25
2. An action of assumpsit for the use and occupation of land will not lie in this State, unless there be an express promise to pay rent. *Long* v *Bonner*, 27
3. Where A. contracted to deliver to B. a certain quantity of corn, if called for by a particular day, and B. did not call for it till some time afterwards, *Held*, that B. was not entitled to recover in *assumpsit* on the contract. *Brown* v *Ray*, 222

ATTACHMENTS.

1. Where in a suit by A. and B., copartners, against C., he pleaded, that in his garnishment on an attachment against A., one of the present plaintiffs, he had admitted that he owed A. the sum for which he is now sued, and he had paid the judgment rendered against him on the garnishment, *Held*, that this plea did not avail him, for he had confessed a debt due to A. alone, being different from that to A. and B. now sued on. *Cook* v *Arthur*, 407
2. Where one is summoned as garnishee in an attachment, who owes a note which is negotiable; if he chooses to stand upon his rights, no judgment can be taken against him, without proof that the absconding debtor still holds the note, or had not assigned it, by endorsement before it was due, for, otherwise, it does not appear that he is indebted to the absconding debtor. *Ormond* v *Moye*, 564

SEE PARTNERS.

AUCTION.

Where, before a hiring commenced, a paper writing was read, purporting to contain the terms of the hiring, and also before the hiring commenced, the crier in an audible voice announced other terms, *Held*, that the hirer or his agent had a right to make such alteration. *Satterfield* v. *Smith*, 60

BASTARDY.

A free person of color is chargeable with the support of a bastard child begotten by him on a white woman. *State* v. *Haithcock*, 32

BILLS, PROMISSORY NOTES, &c.

1. The sole purpose of the Act of 1827, Rev. Stat., ch. 13 and 11, relating to indorsers, was to turn the conditional contract between the indorser and the holder of a bond, into an unconditional one. It was not intended to charge the indorser, as if he had executed bond as a co-obligor, or upon an indorsement without consideration or to deprive him of the Statute of limitations. *Topping* v. *Blount*, 62
2. The interest in a bond payable to A., or to A. or order, can only be transferred at law by indorsement. *Fairly* v. *McLean*, 158
3. Where a note or bond is assigned after it is due, the assignee holds it subject to all the set-offs and payments to which it was subject in the hands of the payee. *Turner* v. *Beggarly*, 331
4. Otherwise, when the note or bond is assigned before it is due, unless the payments are endorsed on the instrument. *Ibid.*

5. Although a bill or promissory note may be made payable to A. B. or bearer yet a bond cannot. That being a deed, it must be made to some certain obligee, to whom it may be delivered. *Marsh* v. *Brooks*, 409

6. After the bond has become a perfect instrument, the obligee can, by indorsement, order the payment to be made to the bearer, for, in respect to their transfer, notes and bonds are put on the same footing. But their nature, in their inception and before indorsement, is not touched by the statute and remains as at common law. *Ibid.*

4 Where A brought an action to recover the amount of a bill of exchange, which he had drawn on B. in favor of C., and which had been accepted by B. and afterwards came into the possession of A. without endorsement, *Held*, that A. could not recover on a count on the bill, because it had not been endorsed to him; and that he could not recover on a money count, without shewing either that the bill had been endorsed to him or in blank, or that he had been obliged to pay the money in consequence of his liability as drawer, or that they had accounted together and the acceptor been found indebted to the drawer in the amount of the bill. *Smith* v. *Bryan*, 418

8. However it may be, as to notes payable *on demand*, whether or not they are considered over-due until demand made; it is certain that a note, payable "at sight" or "when presented," is not due until it is presented. *Osmond* v. *Moye*, 564

See Guaranty.

BONDS.

1. An obligation in these words, 'On or before the first day of January next, I promise to pay to Robert S. Burney or order $160, for the hire of a negro by the name of Abram, and the use of two full crops of boxes on Moore Creek.—Witness," &c., is not a conditional obligation. *Burney* v *Galloway*, 53

2. An obligation for a certain sum, payable in specific articles at a particular time and place, becomes, after it is due, necessarily an obligation payable in money, unless the defendant pleads and proves a tender of the articles, at the time and place mentioned in the contract. *Hamilton* v *Eller*, 276

3. A died leaving three children, of whom B., the defendant, was the guardian, and who had slaves left to them by the will by C. to the amount of upwards of

six hundred dollars. B. gave to D., the plaintiff, a bond, executed on the 4th of February, 1846, of the following purport: I promise to pay D. three hundred and sixty dollars, being in consideration of money which he paid for A. and his heirs, which sum I am to pay when it can be raised out of the estate left to them by the will of C." The writ was issued nearly three years after the date of the bond.

Held, that the true construction of this bond is, not that the payment should be delayed, until the guardian could raise the amount out of the hire and profits of the property, but that it should be made as soon as the guardian could, by proper proceedings, raise the money by the sale of property, and that this could have been done within less than three years. *McRae* v *McRae*, 266

See Bills, &c.

BOOK OF DEBTS.

Under the book debt law, Revised Statutes, chapter 15, in order to entitle the party to recover, he must swear, not only that he "sold," but also that he actually "delivered," the articles, for the price of which the suit is brought. *Adkinson* v *Simmons*, 416

BOUNDARY.

When a deed from A. to B. calls for the line of an adjoining tract, testimony cannot be introduced to control that call, by shewing that, at the time of the execution of the deed, they ran to a different line; that B. afterwards said this last was his line, and that A. and those claimed under him cultivated for many years up to this line. *Johnson* v *Farlow*, 199

CERTIORARI.

1. Where a *certiorari* is returned to Court, no proceedings can be had on it, until notice of its return has been given to the person, against whom it issued. *Bowman* v *Foster*, 47

2. Where money has been paid into a clerk's office upon a judgment, and the judgment is assigned, or the attorney's receipt for the note on which the judgment was obtained has been transferred, by the plaintiff in the judgment to a third person, such assignee has no right to sue the clerk for the money in his own name, as he had but an equitable interest. *State* v *Miller*, 235

COLOR OF TITLE.

Where a deed was delivered merely as an escrow, and never absolutely, was not registered and was finally

destroyed by the maker, by the consent of the party, to whom it purported to be made, it cannot constitute a color of title. *Chastien* v *Philips*, 255

CONSTABLES.

1. Constables are not general collecting agents, except so far as relates to claims within the jurisdiction of a magistrate. Therefore, where an order of the County Court was put into a constable's hands for collection, *Held*, that though he received the money, his sureties were not liable.—*State* v. *Outland*, 134

2. When, in an action upon a constable's bond, the breach assigned is, that the constable "had failed to return to the relator the note" which he had placed in his hands for collection, it is a sufficient defence for the officer to shew, that he had obtained a judgment on the note; for then the note became merged in the judgment and remained in the hands of the justice. *State* v *Hooks*, 371

3. When a constable is appointed by the County Court at May Term, his appointment expires at the next February Term, which is the regular time prescribed by law for the qualification or appointment of constables. *State* v *Burcham*, 436

CONSTITUTION.

See Corporations—Evidence.

CONTRACT.

1. A cropper has no such interest in the crop, as can be subjected to the payment of his debts; while it remains in mass, until a division, the whole is the property of the landlord.—*Brazier* v *Ansley*, 12

2. The doctrine of appropriation, as constituting a delivery and thereby passing the title to the purchaser, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel. And when a less quantity, out of a larger, is the subject of the contract, then no property passes to the purchaser until a delivery, for until then the goods sold are not ascertained. *Ibid.*

3. The vender may appropriate the quantity purchased by separating it from the bulk: but the appropriation is not complete until the vendee assents to take the separate portion.

4. A promise by A., that if B. will marry and have a child by his wife, he will pay him a certain sum, is a valid contract, and upon the contingency happening, B. is entitled to recover the amount, with interest from the time his child was born. *Gurvin* v *Cromatie*, 174

5. Where one had a claim against three distributees, on account of assets received from an intestate's estate, and they jointly promised, verbally, that they would pay the debt; *Held*, that this promise was void under our Statute, being only oral, because each of the defendants was liable separately in proportion to the assets he had received, and by this promise each made himself responsible for the liability of the others. *Hill* v *Doughty*, 195

6. A sold a tract of land to B. and gave him a bond for the title, and B., as the price of the land, promised verbally to pay one hundred dollars to C. to whom A. was indebted. *Held*, that this case does not fall under the 10th section of the statute of frauds, Rev. Stat. ch. 50, sec. 10 and 8, relating to promises to pay the debts of other persons, because the promise is to pay the debt of the very person, to whom the promise is made. *Rice* v *Carter*, 298

7. But in such a case the promise being verbal, comes within that provision of the 8th section, which provides that all contracts to sell or convey lands, &c., shall be void, unless such contract or some memorandum or note thereof be put in writing and signed by the party to be charged therewith &c. Under this part of the section, the verbal promise was void. *Ibid.*

8. Where there is a contract for the sale of a slave, and the question was, whether it was the intention of the parties that the contract was to be considered executed or only executory, the Court cannot decide that question, but must leave it to the jury. *Featherston* v *Featherston*, 317

9. Where a person hired a negro to another, and one of the stipulations at the hiring was, "that the negro should not go by water," and the person, who hired the slave, permitted others to use him and by them he was employed on the water, in consequence of which he lost his life, *Held*, that these latter persons were not answerable in damages, for the loss of the slave to the original hirer; for the stipulation was merely personal, and in no way attached to the slave. *Wilder* v *Creecy*, 421

10. Where a person had in store three thousand one hundred bushels of corn, and sold twenty-eight hundred bushels of it to A., but the 2800 bushels were never separated from the 3100 bushels and the whole was afterwards dertroyed by fire, *Held*, that the property in the 2800 bushels had not passed to A., as there

had been no delivery; and therefore A was not bound to pay the stipulated price. And this result follows, whatever may have been the intention of the parties, as to the property passing presently, on the contract being made. *Waldo* v *Belcher*, 609

SEE ASSUMPSIT. ELECTIONS.

CORPORATIONS.

1. The legislature has the constitutional power to repeal an act establishing a County. It has the same power to consolidate, as to divide, Counties, the exercise of the power in both cases being upon considerations of public expediency. *Mills* v. *Williams*, 558

2. The purpose of making all corporations is the *public good*. The only substantial difference between corporations is, that, in some cases, they are erected by the *mere will* of the legislature, there being *no other party interested or concerned*, and these are subject at all times to be modified, changed or annulled. *Ibid.*

3. Other corporations are the result of contract; the legislature, for the purpose of accomplishing a public good, chooses to do it by the instrumentality of a *second party*. These two parties make a *contract;* the legislature, in consideration of certain labor and outlay of money, conferring upon the party of the second part, the privilege of being a corporation, with certain powers and capacities. Being a *contract*, it cannot be modified, changed or annulled without the consent of both parties.—*Ibid.*

4. Counties, &c., belong to the first class; Rail Road and Turnpike Companies, &c., are instances of the second class. *Ibid.*

SEE ROADS. TURNPIKE COMPANIES.

COSTS.

1. Where a person sued *in forma pauperis*, and recovered a verdict, but the judgment was for the amount of the verdict only, and not for the costs, he cannot afterwards, upon a rule, have an order that execution shall issue against the defendant for his costs. *Carter* v. *Woods*, 22

2. While a suit is in progress, the witnesses have a right to demand from the party, at whose instance they are summoned, the payment for their attendance at the end of each term, or as soon as the suit is disposed of. Their claim after judgment is not against the person summoning them, but against the person bound to pay the costs under the judgment, unless the party

so bound is insolvent. *Ibid.*

3. Where the general charac ter of a party in an action of slander is attacked, and several witnesses are introduced for the purpose of sustaining the attack, the Act of Assembly, requiring only two witnesses to a fact to be taxed in the bill of costs, does not apply. It is a case for the exercise of the discretion of the Judge presiding at the trial. *Holmes* v. *Johnson*, 55

See Roads—Executors & Administrators—Criminals.

COVENANTS.

The assignment of a covenant for the delivery of staves does not, at law, transfer the interest in the covenant. *Cook* v. *Arthur*, 407

COUNTIES.

See Corporations.

CRIMINALS.

When a criminal case is removed for trial from one County to another, in which the prisoner is convicted, the expense of guarding the jail in the County in which the conviction takes place, must be defrayed by the county from which the case was removed. *State* v *Justices of Anson*, 135

CROPPER.

See Contract.

DAMAGES.

In an action against the representatives of a deceased, who had committed a trespass on the property of the plaintiff, the plaintiff cannot, no matter however aggravated the trespass may have been, recover vindictive damages. *Rippey* v *Miller*, 247

See Vendor—Mills–Interest.

DEEDS.

1. A deed, after reciting a sale of land by execution, proceeds thus: "In consideration, &c., the said P. R. sheriff, &c., doth hereby bargain, sell, alien, enfeoff, convey and confirm *with* the said James T. Brooks, &c., their heirs and assigns, &c., to have and hold the same *to* the said, &c., their heirs and assigns." *Held*, that the use of the word *with* does not affect the sense or operation of the instrument; as, upon the context, it is evident, between or with whom the contract is, and by and to whom the estate is conveyed. *Brooks* v *Ratcliff*, 321

2. What the description in a deed for land means, or whether it conveys any definite idea, are questions for the Court, and ought not to be left to the jury. *Edmunson* v *Hooks*, 373

See Frauds, &c.—Evidence.

DEMAND.

Where money has been received by an agent, a demand or misapplication of the money is necessary before an action can be brought, and the Statute of Limitations only begins to run from the time of such demand. *Waring* v. *Richardson*, 77

DETINUE.

Where A. was entitled to a life estate in slaves, and, being threatened with a suit in Equity to enjoin her from sending the negroes out of the State, in consideration that the suit should be forborne, agreed that the slaves should be placed in the possession of B., who was to pay her the hires annually, and they were accordingly so placed in B.'s possession. *Held*, that A. thereby transferred all her legal interest to B., there being a sufficient consideration and an actual delivery of the slaves—that A. therefore could not support an action at law for them, but her only remedy, if B. failed to pay over the hires, was in Equity. *Henry* v. *Wilson*, 285

EJECTMENT.

1. In an action of ejectment, where the plaintiff declares in a single count, upon the *joint and several demise* of different persons, he must be non-suited. *Bonner* v *Carr*, 45
2. Where a recovery is had in ejectment, upon the several demises of different persons, all the lessors may unite in a joint action for the mesne profits. *Camp* v. *Homesley*, 211
3. Where the lessor of the plaintiff in ejectment claims as purchaser at an execution sale, made under a judgment in which he was himself the plaintiff, he must show the judgment as well as the execution—and if the sale was by execution under a decree in Equity, he must not only show the decree, but also the bill and answer and so much of the pleadings and orders, as will shew, that the decree was pronounced in a cause properly constituted between the parties. *Lyerly* v. *Wheeler*, 288
4. In an ejectment brought by a purchaser at sheriff's sale against the defendant in the execution, the latter, while still in possession, cannot resist, upon the ground that he, the defendant, has a better title.—*Ibid.*
5. A recovery in ejectment will not support an action for the *mesne* profits, unless the lessor has regained the posssession, either by being put in under process, or by being let in. *Poston* v. *Henry*, 301
6. Where a recovery in eject-

ment is upon the demise of one of the several lessors, putting another lessor in possession does not entitle the lessor, upon whose demise the recovery was effected, to an action for the *mesne* profits. *Ibid.*

7. In ejectment the rule is well established, that when a person is admitted by the Court to defend as landlord, which he has a right to claim, he stands in the place of his tenant, and can make no defence which the tenant could not have made. *Wiggins* v. *Reddick*, 380

8. When a man claims title under color of title and seven years' possession, it is not evidence of the adverse possession, that he had put the wife of one, who claims to be the owner of the land, in possession. When a husband is in possession, he is not deprived of it by any arrangement between his wife and a third person, pretending to own the land and to put her in possession. *Powell* v. *Felton*, 469

See Color of Title.

ELECTIONS.

A person, who, on the day of, or previous to, an election, furnishes liquor, either at the request of a candidate or any other person, with a belief that such furnishing of liquor is for purpose of influencing the electors, cannot recover his account against the person ordering the supplies, because the contract is against good morals, and the purity of elections, and because such conduct is prohibited by our Statute law. *Duke* v. *Ashbee*, 112

EMANCIPATION.

On a petition, under our Act of Assembly, for permission to emancipate a slave, the right of property in the slave cannot be determined. If a claim of right in property, supported by affidavit or otherwise, is set up, in opposition to the right asserted by the petitioner, the Court should stay proceedings on the petition, until this matter can be determined between the parties, in an action at law or in equity. *Caffey* v. *Rankin*, 449

ESCAPE.

1. Where a sheriff arrested a man on a *ca. sa.* and committed him to jail, in custody of the jailor, and the prisoner escaped; *Held*, that, without a bond of indemnity, the jailor was only bound to the sheriff for want of fidelity or due care in the discharge of his duty. *Turrentine* v *Faucett*, 651

2. A sheriff has a right to take a bond from the jailor to indemnify him for *all loss-*

es, to which he may be subjected by the escape of a prisoner, while in custody of the jailor. *Ibid.*

ESTOPPEL.

1. Estoppels must be mutual, and bind only parties and privies. One, who is not bound by an estoppel, cannot take advantage of it. *Griffin* v *Richardson*, 439
2. Where a grand father, since the act of 1806, made a parol gift of a negro woman slave to his grand-daughter, and placed the slave in possession of the grand-daughter's father, with whom she lived, as her property, and the negro was always alleged by the father to belong to the grand-daughter —*Held*, that the father, and, of course, any person claiming under him, were estopped to deny the grand-daughter's title. *Tarkinton* v *Latham*, 596

See Executors and Administrators.

EVIDENCE.

1. Ordinary care, reasonable time and probable cause, the facts being established or proved, are questions of law, to be decided by the Court. *Biles* v *Holmes*, 16
2. The declarations of a slave, as to his health and the condition of his body, are admissible in evidence in an action brought by his master to recover damages for an injury done to him. *Ibid.*
3. Where on an indictment, the defendant pleads a former conviction, it is competent for him, to prove by one, who was not a witness on the former trial, what a witness, who was examined on behalf of the State on that trial, deposed to, though that witness was still alive and within the jurisdiction of the Court, in order to shew the identity of the cases. *State* v *Smith*, 33
4. Where a society exists, which has its written rules and bye-laws, it is not competent to shew by parol testimony, that there are other rules and usages, independent of those contained in such written rules and bye-laws, *Holmes* v *Johnson*, 55
5. It is not competent to introduce, as a witness, a member of a firm, to prove that his individual board or any other individual debts were to be paid by the firm. *Street* v *Meadows*, 130
6. In an action on a bond, where evidence was given that the bond was to be delivered up, when the obligor paid the costs of a certain suit; *Held*, that this evidence was inadmissible to show that the bond was a conditional one, but that it was proper to show

that, by the agreement of the parties, the bond was to be paid in whole or in part by the payment of the costs of the suit, and, therefore, the obligor, if he paid the costs, was entitled to a credit on the bond, *pro tanto*. *Walters* v *Walters*, 145

7. Where a party offered in evidence the copy of a deed, for the purpose of showing the receipt of money, and it appeared that the deed had not been proved nor acknowledged by the supposed bargainor, but notice had been given to produce the original. *Held*, that the copy was not admissible for any purpose, as the original would not be, until properly proved. *Lambert* v *Lambert*, 162

8. In an action, in which is involved the *bona fides* of a contract for the sale of goods, the declaration of the vendors, at the time of the sale, that they were indebted to the vendee and an agreement between the parties that the price of the goods or a part of it was to be credited on that debt, is competent evidence though the action is against third persons for seizing and converting the goods. *Patton* v. *Dyke*, 237

9. So, also the declaration of the vendors, made some time before the contract, to another person besides the vendee, that they were indebted to the vendee, is competent evidence to prove such indebtedness in an action by the vendee against third persons.—*Ibid.*

10. Whether there be a seal or not to a warrant from a justice, is a mixed question of law and fact, to be decided by the judge below, and from his decision there is no appeal to this Court. *State* v *Worley*, 242

11. In an action brought to recover a penalty for not working on a road in Wilkes county, laid off by Commissioners under an Act passed in 1849, chap. 100, it is necessary, before a recovery can be effected, to shew that the Commissioners were duly sworn as the Act directs. *Colvert* v *Whittington*, 278

12. *Held*, that this Court cannot presume, that the emancipation of a slave is void by the laws or policy of South Carolina, but that this fact should have been proved. *Jones* v *Abernathy*, 280

13. The declaration of a partner, after the purchase of an article, that he had purchased it for and on account of the firm, is not, of itself, sufficient evidence to make his co-partners liable.—*White* v *Gibson*, 283

14. Where a witness for the

plaintiff, on being examined as to a particular transaction, stated that he had paid a certain sum of money to the plaintiff, and the witness' credit was attacked and the transaction impeached for fraud, *Held*, that it was competent for the plaintiff to shew that he had entered the payment on his books at the time alleged. *Fain* v *Edwards*, 305

15. Where the subscribing witness to a deed for land or slaves and the maker are dead, or cannot be procured, whereby it cannot be acknowledged by the one or proved by the other, recourse may be had to the common law mode of proof, for the purpose of making the deed evidence at common law generally. *Currier* v *Hampton*, 307

16. In such a case the party would be under the necessity of giving similar evidence of the execution on the trial. *Ibid.*

17. A mere mark or cross of an illiterate subscribing witness, *prima facie*, cannot be identified, and therefore the instrument may be read upon proof of the hand-writing of the party. *Ibid.*

18. Where from the certificate of the probate of a deed, it only appeared that the witness swore, in general terms, that the signature of the party was in his hand-writing, but he did not state upon what grounds he formed his opinion, nor by what means, he had acquired a knowledge of the hand-writing of the party, *Held*, that this evidence gave no authority to grant an order of probate. *Ibid.*

19. Where a man has charged a woman with incontinence with a particular individual, he cannot, on the trial of an action for this slander, go into evidence to show that she was incontinent with other persons—*Watters* v. *Smoot*, 315

20. The declarations of the husband, who is necessarily a party to the suit for slander of his wife, are admissible in evidence to show her guilt. *Ibid.*

21. Where a man has conveyed a chattel, but still retains the possession, his acts and declarations, even subsequent to such conveyance, while he continues in possession, are evidence against the vendee or grantee, on a question of fraud. *Foster* v *Woodfin*, 339

22. The official returns of a guardian to the County Court of the state of his account with his ward are admissible evidence, in an action against the Clerk of the County Court for neglect of duty in not issuing a *scire facias*, as required by law, to cause the guardian to renew his bond.—*State* v *Biggs*, 412

23. In order to make the declarations of a deceased person evidence, as "dying declarations," it is not necessary that the person should be *in articulo mortis* (in the very act of dying); it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn, as if an oath had been administered. *State* v. *Tilghman*, 513

24. A witness cannot be admitted to state, that "he thought, the deceased thought, he would die from his wounds." He cannot give his own opinion, but only depose to the state of the wounds of the deceased and what he *then* and *there* said and did, from which the Court may decide what he thought of his condition. *Ibid.*

25. If the deceased, at the time he made the declarations, was, *in fact*, in a condition to make them competent evidence, a hope of recovery, at a subsequent time, would not render them incompetent. *Ibid.*

26. The admission of dying declarations, as evidence, is not in opposition to that part of the Bill of Rights, which says, that, "In all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony."—*Ibid.*

27. Parol evidence may be admitted to show a custom or usage of a place, where a contract is entered into, for the purpose of annexing incidents to, and explaining the means of terms used in it. But before the incident can be annexed, the contract itself, as made, must be proved. The incident cannot be used to establish the contract, nor can it be inconsistent with the terms of the contract. *Moore* v *Eason*, 568

28. It is no ground of exception to a deposition, that the notice was given to take the depositions of A., B., C. and others, and the deposition of neither A., B. nor C., was taken. *McDugald* v *Smith*, 576

29. Where a copy of a Statute of another State has been received in evidence in the Court below, upon insufficient proof, yet if it is made to appear to this Court from an official and proper source, that the copy, so received in evidence, was correct, a *venire de novo* will not be awarded for that error.—*Ibid.*

30. Where notice has not been given to produce a bill of sale or other instrument of writing, or where its absence is not satisfactorily accounted for, it is not competent

to introduce, as evidence of the execution or contents of the instrument, the oral admissions or declarations of the alleged maker.

A party cannot introduce secondary evidence of the contents of a written instrument, merely upon shewing that the instrument, though in existence, is in another State. *Threadgill* v. *White*, 591

SEE BOUNDARY—MALICIOUS PROSECUTION—WARRANTY EJECTMENT—ADMINISTRATORS AND EXECUTORS—REWARD—WILLS.

EXECUTIONS.

1. An officer, who has an execution against a tenant in common of chattels, may levy upon the undivided property and take it into his possession, for the purpose of selling the interest of the defendant in the execution; and he does not thereby subject himself to an action by the other tenant in common. *Blevins* v *Baker*, 291
2. Where the land of a debtor has been sold by execution and an action is brought against him to recover possession, he has no right to object that the sheriff has not made the deed to the purchasers at the execution sale, since the sheriff may convey to an assignee, whether he be an assignee by law or by contract. *Brooks* v *Ratcliff*, 321
3. A purchaser of land at an execution sale gets a good title, although the sale was made on Tuesday or Wednesday of the week, on the Monday of which the writ was returnable, but was not returned. *Ibid.*
4. A reversion in fee, after a term for years, is the subject of execution; the sheriff's deed is as effectual to pass it as that of the reversioner; and the tenant, who claims under such deed, is not estopped from setting it up as a bar to an action of ejectment by the reversioner. *Murrell* v *Roberts*, 424
5. Payment to the sheriff discharges an execution; and a subsequent sale of property under such execution is void, and conveys no title to the purchaser. *Ibid.*
6. A., by a *bona fide* deed proved and registered in May 1843, conveyed a slave to B. in trust to secure the payment of certain debts. B. by deed, conveyed the slave to C. for a certain price, all of which was afterwards paid by A. except $100. C. then by deed dated in 1847, and proved in 1849, in consideration of the said $100 conveyed the slave to D. *Held*, that, though D. might have taken that conveyance in trust for A. upon the payment of the $100, yet while the property remained in that situation, the $100 not

being paid, A. had no such interest as was liable to an execution against him.—*Griffin* v *Richardson*, 439

7. When a vendor of land retains the title, as a security for the purchase money, and a balance remains due, the vendee has not such an interest as is liable to execution under the Act, Rev. Stat. ch. 45, sec. 4, so as to divest the legal title of the vendor. *Badham* v *Cox*, 456

8. Under a *venditioni exponas* against land, the sheriff can sell only that, which he could have sold under the *fi. fa.* on which the *venditioni exponas* issued, while such *fi. fa.* remained in his hands unreturned. *Ibid.*

9. If the defendant in an execution has no interest in land, which is snbject to be levied on, while the *fieri facias* remains in the hands of the sheriff, unreturned, but, after the return, he acquires a title, which is subject to execution, this subsequently acquired title cannot be sold under a *venditioni exponas* issuing upon such *fieri facias*. *Ibid.*

10. Such subsequently acquired title shall not operrate as an estoppel, in favor of a purchaser at a sale, made under such *venditioni exponas*. The law only sells *estates* under its process, and not the *chances of an estoppel*. *Ibid.*

11. A Court Martial is a Court of special and limited jurisdiction. It must be organized agreeably to law, and this must be shewn distinctly by every one, who seeks to enforce its sentences or justify action under i's precepts. Therefore, where a company court martial, as is required by our law, must be comp sed of at least two commissioned officers, and it did not appear in this case that more than one commissioned officer sat in the Court, an execution, issued by a tribunal so constituted, is void and does not justify an officer in acting under it. *Bell* v *Tooley*, 605

12. Where an execution is about to be levied by a constable, the debtor, if he has personal property, must shew it, and, if he does not the officer commits no wrong by levying on the land in the first instance. *Sloan* v *Stanly*, 627

13. So, if it does not appear that the officer knew of the existence of the personal property, he is justifiable in levying on the real estate. *Ibid.*

14. If an interlineation appears on the face of an officer's return, and there is no evidence to shew when it was done, the Court will presume that it was done before the return was made,

when the officer had authority to alter his return. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

1. An administrator is protected by judgments, rendered against him within the nine months allowed him to plead, though in suits after that in which he pleads them. *Terry* v. *Vest*, 65
2. An administrator, who establishes his plea of fully administered is entitled, of course, under our Statute, to his costs; and the plaintiff, though he take a judgment *quando*, cannot have a judgment against the surety in the administrator's appeal bond, the case having been tried upon appeal. *Ibid.*
3. The next of kin cannot maintain an action on the administration bond, after the death of the administor, because he failed to take into his possession, and distribute, certain negroes to which his intestate was entitled. These negroes pass to the administrator *de bonis non*, and are to be by him distributed. *State* v *Britton*, 110
4. Money belonging to an intestate, used by his widow after his death, must be accounted for by her to the administrator. *Griffin* v *Simpson*, 120
5. A surety to an appeal by a party, who dies pending the suit, has no lien on his assets until after he has paid what, by the judgment, he was ascertained to be liable for as surety. *Green* v *Williams*, 139
6. The next of kin cannot support an action on an administration bond for their distributive shares, because this implies that the estate has not been administered, and the action should be by an administrator *de bonis non*. *State* v *Moore*, 160
7. An executor *de son tort* is entitled to no action.—*Francis* v *Welch*, 215
8. One cannot be held liable as executor *de son tort*, where there is a rightful executor, except in cases alleged to be fraudulent.—*Ibid.*
9. The jury cannot allow commissions to an executor, &c., without a previous order of the County Court; but it is not necessary that this order should be made before the commencement of the suit against the executor. *Lynch* v *Johnson*, 224
10. Where the plea of fully administered is found in favor of the administrator, and, upon a *scire facias* against the heirs, they come in and plead that the administrator has assets, *Held*, that upon the trial of the issue upon that plea, the

heirs may give evidence of any assets received by the administrator, either before or after the trial of the original suit, and up to the time of the plea pleaded to *sc're facias*. *Carrier* v *Hampton*, 307

11. In actions by administrators, the letters of administration, granted, as they are, by a domestic tribunal of exclusive jurisdiction, and remaining unrevoked, are *prima facie* evidence of the death of the alleged intestate and of the right of representing him. *Brickhouse* v *Brickhouse*, 404

12. The provisions of the Act of 1846 ch. 1, (Pamphlet Laws) do not apply to a case, where an administrator of the deceased was appointed before the 1st of February, 1847, though that administrator be dead, and an administration *de bonis non* be granted, subsequently to that date, when the Act was to go into operation. *Powell* v *Felton*, 469

13. Where an executor arrests a defendant on a *ca. sa.*, sued out on a judgment obtained by his testator, and afterwards dies, and the proceedings on the *ca. sa.* are discontinued, and then administration *de bonis non, with the will annexed*, is granted, this administrator is not liable in any way for the costs of the proceedings on the *ca. sa.* *Hampton* v *Cooper*, 580

14. No action at law can be maintained, to collect the assets of a deceased man, except by his personal representative; but where A., claiming a slave as a distributee of B., employs C. to sell such slave, and accordingly sells the slave and receives the price, he receives it for the use of A., and cannot dispute the title of A., but is bound to account with him for the sum received. *McNair* v *McKay*, 602

See Intestate's Estates, Damages.

Forma Pauperis. See Costs.

FRAUDS AND FRAUDULENT CONVEYANCES.

1. Under our act of Assembly a man cannot be held to be a purchaser for a valuable consideration, who gives for the land not more than one half or two thirds of the value. *Harris* v *DeGraffenreid*, 89

2. Although one of the debts inserted in a deed of trust to secure several creditors be fraudulent, yet the legal title passes to him and his sale to a third person is valid. *Ibid.*

3. A man, being bound to maintain and support his father, conveyed a tract of land to his brother in trust to perform the conditions of that bond in the

first place, and then out of the proceeds of the land to pay the other creditors of the maker of the deed. In the deed was contained the following clause: "The manner of executing the deed, as to the support of my father," is left to the discretion of the maker of the deed. *Held*, that this did not make the deed, on its face, fraudulent in law, for it reserved to the maker no control over the fund, but only the manner, in which the father should be supported. *Gibson* v *Walker*, 327

4. The fact, that the debt to the father was prospective, as well as immediate, does not make it illegal to give it the preference. *Ibid.*

5. Where a man makes an absolute conveyance of a chattel, purporting to be either a sale or a gift, and continues for a long time in the possession of the chattel, so purported to be conveyed, this creates, in law, a strong presumption, on which the jury should find the conveyance fraudulent, as against creditors, unless opposing and explanatory circumstances should rebut the presumption. *Foster* v *Woodfin*, 339

6. Fraud is never, exclusively, a question of fact, that is, in the sense of leaving it to the uncertain judgment of the jurors to give to the intent to convey upon a secret trust, or to the fact of credit being given to the grantor, upon his continuing in possession, such effect as to them, in each case, may seem proper, but, on the contrary, the effect of such an intent or false credit, if in fact existing, depends upon the fixed principles of the law. *Ibid.*

7. Where a deed of trust for the payment of debts conveys a cotton factory, &c., and in the deed are provisions, that the maker of the deed shall retain possession for eleven months and during that time his family may be supported out of the proceeds of the factory, *Held*, that these provisions did not make the deed fraudulent in law, upon its face, but, as the provisions might have been for the benefit of the creditors, as well as of the debtor, the question of fraudulent intent was one, upon which the jury must decide under all the circumstances.—*Young* v *Booe*, 347

See Evidence—Contracts.

GRANTS.

See Presumptions.

GUARANTY.

On the guaranty of a note, the guarantee is not bound to show that he has made a demand on the maker, but the guarantor is only dis-

charged, when it appears that he has suffered loss in consequence of the guarantee's not using due diligence. *Farrow* v *Respess*, 170

GUARDIAN AND WARD.

1. Where a guardian to an infant, appointed by a County Court in this State, taking with him a part of the property of the infant, the Court which made the appointment has the right to remove him, without notice, and appoint another in his place. *Cooke* v *Beale*, 36
2. Where a person, settling with a guardian, paid him, by mistake, more money than he was entitled to receive, *Held*, that he was entitled to recover the excess from the guardian individually. *Tow* v *Elliott*, 51
3. In charging a guardian, the mode of compounding interest is to make annual rests, making the aggregate of the principal and interest, due at the end of a particular year, a capital sum bearing six per cent. interest thence forward for another year, and so on, with rests from year to year. But if a sum be found due at a rest day during the guardianship, that sum, being then converted into capital, is entitled to draw interest thereafter until it shall be paid, and that is but simple interest, there being no subsequent rest made. *Ford* v *Vandyke*, 227

GUARDIANS.

The County Court, on the petition of the guardian of a certain infant, passed the following order—"Ordered that he, the said W. B., guardian, sell the land, of said deceased T. H., or so much thereof as will be sufficient to discharge the debts." *Held*, that this order was unauthorized and void, and, of course, that a purchaser under it acquired no title. *Ducket* v *Skinner*, 431

See Evidence.

INDICTMENT.

1. The provisions of the Act of 1811, ch. 814, Rev. Code, Revised Statutes, ch. 34, sec. 61, punishing the cheating by false tokens, &c, do not apply to the case of conveyances of lands. *State* v *Burrows*, 477
2. Where the charge intended to be made in such an indictment is, that the defendant intended to cheat the plaintiff out of twenty acres of land, the excess in quantity over thirty-five acres, the indictment should expressly aver that there was, in fact, such an excess of twenty acres. *Ibid.*
3. Where the true ground of complaint was, that the defendant, by means of a

forged paper, induced the prosecutor to execute a deed for 35 1-2 acres of land instead of 55 1-2 acres, thereby defrauding the prosecutor, the indictment should distinctly aver this fraudulent purpose; but, though this be a fraud, it does not come within the definition of any crime or misdemeanor. known either to the common or statute law. *Ibid.*

INSOLVENT DEBTORS.

1. A householder, who wishes to avail himself of the provisions of the Act of Assembly of 1844-45, ch. 32, Ire. Digested Manual, p. 118, may do so, by making application and procuring the assignment to be made according to the Act of Assembly, at any time, even after a levy of an execution or attachment, before the property is changed or converted by a sale. *State* v *Floyd*, 496
2. In the case of a proceeding under the insolvent debtor's law, the Court has authority to permit the schedule to be amended, so as to make more certain the description of the defendant's interest in matters there set forth, at any time before the oath is administered; and if the plaintiff is surprised, it is ground for a continuance. *McLeod* v *Kirkham*, 509
3. It is sufficient to file the evidence of the debts, set out in the schedule, which are in the possession and control of the defendant, at any time before the oath is administered. *Ibid.*
4. It being a matter of public notoriety, that proclamation money is wholly worthless, it is not necessary to state in the schedule the amount thereof with nicety, or to file the same. *Ibid.*
5. A bond, given by a person arrested on a *ca. sa.* for his appearance at Court, is required by our law to be made payable to the plaintiff in the execution; a bond, otherwise payable, for that reason alone, will prevent the Court from entering a summary judgment. *Williams* v *Bryan*, 613
6. Where a person, arrested on a *ca. sa.*, gives a bond payable to A. B., who makes the affidavit for the *ca. sa.* and styles himself the agent of C. D., the plaintiff, no action can be maintained on such bond, in the name of D., for he is not the obligee. *Ibid.*

INTEREST.

1. When A., a citizen of Georgia, being in this State, offered to lend to B. six thousand dollars, but on his return to Georgia, not having sold his cotton crop, wrote to B. that he could only lend three thousand dollars, whereupon B. went

to Georgia, there received the money and executed his note for that amount. *Held*, that B. was bound to pay eight per cent., the interest according to the laws of Georgia. *Davis* v *Coleman*, 303

2. The party, who sues to recover the stipulated damages, is not entitled to claim interest, even from the date of his writ. *Devereux* v *Burgwin*, 490

3. In England the rule is, that interest is to be allowed, where there has been an express provision to pay interest, or where such promise is to be *implied* from the usage of trade, or other circumstances. But for goods sold, money lent, money paid, work and labor done, or on a guarantee, interest is not allowed unless there be an express or implied agreement. Our decisions have extended the rule, and for money lent, or money paid or had and received, or due on an account stated, the jury ought to be instructed to allow interest, the promise to pay being implied from the nature of the transaction.—And in trover and trespass *de bonis asportatis*, the jury may, in their discretion, allow interest upon the value, from the time of the conversion or seizure, as a part of the damages, so as to compel the wrong doer to make full compensation, by charging him with the price, as at a *cash sale*. *Ibid.*

INTESTATE'S ESTATES.

1. An advancement to a husband by his father in law is an advancement to the wife. *Bridgers* v *Hutchins*, 68

2. The release or cancelling of the bonds of a child, with an intention thereby to prefer him in life, is as much an advancement as so much cash. *Ibid.*

3. In order to constitute an advancement of a slave by parol gift, there must be an actual delivery and change of possession. *Meadows* v *Meadows*, 148

4. While a son continues to reside with his father the gift has no operation, but when he removes and takes the slave with him, the advancement becomes effectual and its value must be estimated at that period. *Ibid.*

5. A child does not lose the benefit of an advancement of a slave by selling it.—*Ibid.*

6. Advancements are understood to be gifts of money or personal property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the main-

tenance or education of the child. *Ibid.*

JURISDICTION.

1. A *ca. sa.*, issued by a justice of the peace in Buncombe county, ought to be returned to the County Court of that county, notwithstanding the provisions of the Act of 1844, abolishing jury trials in the County Courts of Buncombe. *Fox* v *Wood*, 213
2. Where a suit is commenced in the Superior Court for a less sum than sixty dollars for goods, &c. sold, or for a less sum than one hundred due by note, &c., the suit shall be dismissed; and if the party demands more in his writ for the purpose of evading the law, and the jury finds that a less sum is due to him than that of which the Court has jurisdiction, he shall be non-suited: provided that if the party will make affidavit that the sum, for which he has sued, is really due, but he cannot establish it for want of proof, or that the time limited for the recovery of an article bars a recovery, then the plaintiff shall have judgment, &c. *Parham* v *Hardin*, 219
3. *Held*, that the same rules apply to suits in the Superior Court of Cleaveland county, removed under the private acts of 1844 and 1846, from the county to the Superior Court of that County. *Ibid.*
4. A. being a surety for B., to indemnify him B. gave him a lien on some hogs. B. afterwards sold the hogs to C. A. refused to deliver the hogs, unless C. would agree to pay the debt for which A. was bound. This C. promised, but failed to make payment, and A. had to pay the debt himself. He then warranted C. for the money so paid. *Held*, that a justice of the peace had no jurisdiction in the case. *Cogle* v *Hamilton*, 231
5. Under the act of 1848, relating to the county of Polk, all the records, transferred to the Superior Court of Polk from the county of Rutherford, are directed to be returned to the Superior Court of Rutherford county, the act of 1846 establishing the Superior Courts in Polk having been repealed by the act of 1848; *Held*, that the Superior Court of Rutherford had the right to issue an execution on a judgment, rendered in the county of Polk, while the latter had jurisdiction, as to cases from the former county, removed by the act of 1846 and transferred by the act of 1848. *Mat thews* v *Gilreath*, 244
6. Where a petition had been

filed in the County Court by the next of kin of an intestate for the sale of negroes for the purpose of distribution, and a sale had been made by a commissioner appointed by the Court, according to the prayer of the petitioners, and he had paid over to them what he alleged to be their full respective shares; it is not competent for these petitioners to file a subsequent, original petition in the same Court, charging that the commissioner had not paid them their full shares, (they having signed a receipt in full by a mistake) and requiring the commissioner to account, &c. and pay over the balance, &c. *Reid* v *Pass*, 589

7. Their relief could only be obtained by an application to the County Court for a rehearing, if the proceedings of the commissioner had been confirmed, or by recourse to a Court of Equity to set aside the receipt, if given through mistake. *Ibid.*
8. A Court of Equity has a general jurisdiction to direct the sales of the estates of infants, wherever the purpose, for which the sale is directed, shall be deemed by the Court beneficial to infants. *Williams* v *Harrington*, 616
9. The decree in such a case cannot be impeached in any other case; neither upon the ground, that a guardian was not appointed by the proper Court, nor that there was not due advertisement or competent evidence of it, nor that the interest of the infant was not promoted by the sale, nor that the decree did not find the facts, which shewed the sale to be beneficial, nor upon any similar grounds. *Ibid.*
10. Where a decree is made, on behalf of infants, for the sale of "the lands of the deceased debtor lying in Moore county," and a sale is made of several specified parcels of land, the sale ratified, and an order of the Court to convey to a particular purchaser, no exception can be taken to the general description of the land in the decree ordering the sale. *Ibid.*
11. The Court has the power, with the consent of the purchaser, to substitute another person in his place; though, as a matter of wholesome practice, such a substitution ought not to be allowed, before the payment of the purchase money, nor, perhaps, without looking to the rights, even of third persons, as against the first purchaser. *Ibid.*
12. Under an order of the Court of Equity for the sale of the real estate of infants, the deed of the commissioner appointed to

make the sale, by virtue of the provisions of the Act of 1827, transferred to the purchaser the legal title. *Ibid.*

JUSTICES OF THE PEACE.

1. The preamble to a warrant constitutes a part of it, and where it sets out, in apt words, the offence, for which, as the plaintiff alleged, the defendant had incurred the penalty sued for, the form is a proper one. *Harshaw* v *Crow*, 240
2. A seal is essential to a warrant, issued by a magistrate to arrest a person for a criminal offence, and, if there be no seal, the warrant is void, and the defendant is justified in resisting its execution. *State* v *Worley*, 242

SEE JURISDICTION.

LARCENY.

1. Turpentine, which has run out of the boxes cut into the tree for the purpose of receiving the liquid, is the subject of larceny. *State* v *Moore*, 70
2. But to support an indictment for stealing two barrels of turpentine, it must appear that the turpentine was in barrels when it was stolen, not that it was dipt from the boxes in small quantities, from time to time, and then deposited in barrels. *Ibid.*

LAWS OF OTHER STATES.

SEE EVIDENCE.

LEGACIES.

1. An infant mulatto child was found at the door of a gentleman, who took charge of it, and it remained in his possession for more than seven years, he professing that he did not claim her as a slave, but believed she was free, and refused to deliver her to any person, who could not show a good title to her as a slave. At his death, he left her two hundred dollars. *Held, first*, that, if she was free, of course the next of kin could not claim distribution of her or of the legacy; *secondly*, if she was a slave, the next of kin were entitled to distribution of the legacy, and also of the girl herself, if he had her three years or more in adverse possession; and that, to vest the title of the slave in him, by virtue of the statute, it was not necessary that he should have claimed her as a slave.—*State* v *Jones*, 154
2. When slaves, by a will made by a testator in South Carolina, were directed to be emancipated, and then the testator says "all the balance of my estate to belong to C. J." *Held*, that C. J. could not claim these negroes at law under the residuary clause, even if

the bequest for emancipation were void by the laws of South Carolina, because they did not pass by the words of the residuary clause, but only fell into the residue of the operation of the law, and C. J.'s title was only an equitable one. *Jones* v *Abernathy*, 280

3. A testatrix bequeathed as follows, "My girl Maria, after my death, I do not leave her as a bond slave to any person, I wish her to live among my children, or otherwise if she sees proper. I leave J. S. to act as trustee for said girl." Also, "I will and bequeath twenty-five dollars to Maria." *Held*, that, under this will, J. S. took the legal title to the girl Maria. *Simpson* v *King*, 377

LESSOR AND LESSEE.
See Taxes.

LIMITATIONS, STATUTE OF

1. A promise of a party that he will settle with another will only take a claim out of the Statute of Limitations, when it clearly appears that the promise referred to that particular claim. *Arey* v *Stephenson*, 86

2. Where, to an action on a justice's jndgment, the defendant pleads "the Statute of Limitations," the plaintiff cannot reply, "a new promise within the seven years." The replication of a new promise is confined in actions "on promises". *Taylor* v *Spivey*, 427

3. After a debt had been barred by the statute of limitations, the debtor said to the creditor, "unless J. R. has paid it for me, it is a just debt and I will pay it;" and again, "it is a just debt and I will pay it, if I cannot prove that it has been been settled by J. R."—*Held*, that the case was thereby taken out of the statute. By such declarations, the *onus* of proof that the debt had been paid rested on the defendant.—*Richmond* v *Fuqua*, 445

4. Where a plaintiff in an action of assumpsit, in order to bar the operation of the statute of limitations, gives in evidence words used by the defendant, the language must be such as, without straining, imports a willingness and intention thereby to assume the debt, or amounts to an unequivocal acknowldgment of its subsistence and obligation. *Taylor* v *Stedman*, 447

5. In a conversation between the plaintiff and the defendant, in relation to the matter in dispute, the former said to the latter, "that matter about Frank's hire in 1842 must be fixed," when the latter asked, "will not other notes or judg-

ments do instead of my note?" and the plaintiff remarking, "yes, if they are good," nothing further passed between them, *Held*, that the defendant's expressions did not revive the debt, and bar the operation of the statute. *Ibid.*

SEE DEMAND—LEGACIES—PENAL ACTIONS.

MALICIOUS PROSECUTION.

1. The verdict of a petit jury, acquitting a man indicted for a conspiracy, does not, in an action for malicious prosecution, support the averment, that the indictment was without probable cause. *Bell* v *Pearcy*, 233
2. In an action for malicious prosecution, the plaintiff must shew particular malice on the part of the defendant towards him.—*Brooks* v *Jones*, 260
3. This particular malice may be proven by positive testimony of threats or expressions of ill will, used by the defendant in reference to the plaintiff, or it may be *inferred* from the want of probable cause and other circumstances, such as, in this case, are apt to endanger angry feelings. *Ibid.*

MILLS.

The owner of land, injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed is as high as twenty dollars, and who has taken judgment for, and received the damage for, the whole five years, cannot maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition.—*Gilliam* v *Canaday*, 106

NAVIGABLE WATERS.

That "all waters, which are actually navigable for sea vessels are to be considered navigable waters, without regard to the ebb and flow of the tide, and that no one is entitled to the exclusive right of fishing in any navigable water, unless such right be derived from an express grant by the sovereign power, or, perhaps, by such a length and kind of possession, as will cause a presumption of such grant to arise," must now be deemed the settled law of this State. *Fagan* v *Armistead*, 433

OVERSEER.

An overseer is not strictly a bailee, though many of the principles of that relation and many of its duties attach to him. It is his duty to take such care of the property entrusted to him, as a man of ordinary prudence would take of his own property. *Smith* v *Camer-*

on, 572
SEE ROADS.

PARTNERS.

1. On a separate judgment against one partner for a partnership debt, only the interest of that partner, in any portion of the partnership property, can be sold by execution. *Price* v *Hunt*, 42
2. The effects of a firm are not subject to attachment for the separate debt of one of the partners. *Cook* v *Arthur*, 407

PAYMENTS.

It is the rule in this country to apply payments to the debt, for which the security is the most precarious, when no application is made by the party who pays. *State* v. *Thomas*, 251

PENAL ACTIONS.

A common informer cannot recover a penalty, unless he sue within the period allowed by the act imposing the penalty. As where a penalty is imposed on persons fishing in the Roanoke river at certain times, and any person may sue for the same, provided he does so within one month from the forfeiture, and if no such suit is brought within that period, the law-officer of the State is directed to sue for the use of the State, (act of 1827, ch. 54,) it was held that, after the expiration of the month, the right of the common informer was gone. *Fagan* v *Amistead*, 433

PLEADING, PROCESS AND PRACTICE.

1. Where there is an action on a bond against two obligors, and a non-suit is entered as to one, this is no *retraxit* as to him. *Crawford* v *Glass*, 118
2. On a *scire facias* against heirs to subject the lands of their ancestor, it is too late for them, after they have appeared and pleaded to the *scire facias*, to move to dismiss the proceedings because no declaration has been served on them, although some of the heirs may have been infants.—*Tripp* v *Potter*, 121
3. Where a *scieri facias* has been sued out upon a judgment, and while it is in the sheriff's hands, the parties agreed that the collection of the money should be suspended, so as to enable them to make a full settlement, yet the sheriff is not thereby excused from returning the process, but is liable to an amercement, if he fails to do so. *Morrow* v *Allison*, 219
4. The Act of 1826, Rev. Stat. ch. 31., sec. 119, authorizing references to be made in Courts of law to state the accounts of administrators, executors and guardians

applies only to suits brought upon their bonds respectively. It does not apply to suits, brought upon bonds given by a testator or intestate, in which fully administered is pleaded.—*Lynch* v *Johnson*, 224

5. Where an assignee of a bond brings an action of debt upon the bond, and the defendant pleads *non est factum* only, this plea does not deny the assignment. But, if the action be on the case, as given by our Statute to the assignee of a bond, the general issue denies both the execution of the bond and the endorsement.—*Ford* v *Vandyke*, 227
6. The plea of payment to an action on a judgment, &c., is sufficient to cover the defence of a presumption of payment or abandonment of claim under our act of 1826. *Butts* v *Patton*, 262
7. Where a man, who is liable to militia duty, is arrested on a civil process while he is attending a militia muster, in violation of the Act of Assembly, he may plead the same in abatement.—*Murphy* v *McCombs*, 274
8. That the plaintiff, who sues as executor, is not an executor, is a plea in bar, and the defendant may plead it with any other bar. *Shown* v *Barr*, 296
9. In cases of verdicts, subject to the opinion of the Court, all the points, on which either party means to insist, ought not to be reserved, for all points not reserved are taken to be given up. If one of the parties cannot have inserted a question, on which the presiding Judge inclines against him, he ought not to consent to such a verdict, but peremptorily claim that an opinion shall then be given to the jury, as he has a right to do. *Brooks* v *Ratcliff*, 321
10. Where an action was brought in the name of James Brooks, William E. Colton and William E. Churchill, partners trading under the name and firm of "Brooks, Colton and Company," and the judgment was in the name of Brooks, Colton & Co., *Held*, that this was a variance, for which the judgment might have been reserved at common law, but the error was cured by our Statute of amendments, Rev. Stat. ch. 3, sec. 5.—*Ibid.*
11. The acts of a ministerial officer, as a constable or sheriff, in making returns on warrants and writs, although required by law to be returned into a Court of record, do not make a part of the *record*, are only *prima facie* taken to be true, and may be contradicted and shewn to be false, antedated, &c. *Patterson* v *Britt*, 383

12. A reference to the Clerk of the Court to take and report the accounts of an executor, administrator or guardian, can only be made under the Act of 1826, Rev. Stat. ch. 31, sec. 119, in a suit brought upon the bond given by such executor, administrator or guardian for the faithful performance of his duty. *Anderson* v *Jernigan*, 414

13. Where one has a cause of action against another, accruing *after a demand* made, the suing out of a writ for that cause of action, though the writ was in assumpsit, when it should have been in covenant, is a demand in the strongest form. *Nixon* v *Long*, 428

14. Where several cases have been decided upon the same question, after argument, the Court will not reconsider the grounds of those decisions, especially upon a case presented without argument. *Fagan* v *Armistead*, 433

15. When both parties appeal from a judgment, the Clerks of the Superior Courts must make out two transcripts, so as to constitute, as there really are, two cases in the Supreme Court. When this is neglected the Clerk of the Supreme Court will state two cases on his docket, and charge costs in each case. *Devereux* v *Burgwin*, 490

16. There is a distinction between a cause for a *new trial* and a cause for *mistrial*; the former is a matter of discretion—the latter a matter of law. *State* v *Tilghman*, 513

17. Where, on a trial, the circumstances are such, as merely to put suspicion on the verdict, by shewing, not that there *was*, but that there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it; it is a matter within the discretion of the presiding Judge. But *if the fact be*, that undue influence was brought to bear on the jury; as if they were fed at the charge of the prosecutor or the prisoner; or if they be solicited and advised how their verdict should be; or if they hear other evidence than that which was offered on the trial; in all such cases, there has been, in contemplation of law, *no trial*, and this Court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner. *Ibid.*

18. Where the facts, in relation to the jury, on a trial for murder, were, that the jury were placed in the charge of an officer and confined in the ordinary jury room; that they retired from the Court on Thursday at 6 P. M. and

rendered their verdict on Saturday at 10 A. M.; that while out, the members of the jury separated at various times to obey calls of nature—that each one separated himself from the others, more than once for this purpose, and one of them as often as six times; that, when they did this, they went, one at a time, under charge of an officer, and, during such absence, the other jurors remained together in the jury room, with the door locked; that they went about fifty yards from the Court-house, and returned as soon as practicable, holding no intercourse with any one; that one of the jurors separated himself from his fellows, and visited a drug store, about one hundred and fifty yards from the jury room, for the purpose of procuring medicine, being sick; that he went under the charge of an officer, and held no conversation except with the keeper of the drug store, who asked him if they had agreed on their verdict, to which he replied "they had not;" that this store was in the most public place in the town of Newbern; that another juror separated himself from his fellows and stood on the outside of the jury room near the door, closed, and conversed privately for ten or fifteen minutes with a third person, but what was said did not appear; that the jurors also ate and drank while out, but not to excess; that a part of the time they did so with the permission of the Court, but when enjoined by the Court not to eat or drink, they violated this injunction, contrary to the wishes of the officer, who had them in charge; that several jurors wrote notes and dropped them from the windows of the jury room, and also received notes from persons not of the jury, but neither the contents of the notes nor the names of the persons, to whom sent or from whom received, appeared; that some of the jurors conversed from the windows with persons in the street on various subjects, and about this suit, but what was said did not appear; and that some servants and small children had access to the jury room, the servants for the purpose of carrying food and clothing to the jurors, and the children to see their fathers. *Held*, that these facts might, in the discretion of the presiding Judge, have been a good cause for granting a new trial, but they could not justify the Court in declaring as a mater of law, that there was a mistrial. *Ibid.*

19. Although it be not error to refrain from giving in-

structions, unless they be asked for; yet the Judge, when he does give instructions, either of his own motion or at the party's, should give them in such a way, that they be not in themselves erroneous, or so framed as to mislead the jury. *Bynum* v *Bynum*, 632

See Attachments—Emancipation.

PRESUMPTIONS.

1. In order to raise the presumption of the grant of an easement, two things are necessary: there must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant. *Felton* v *Simpson*, 84
2. *It seems* that the presumption of the death of an individual, arising from his absence from his domicil for seven years, does not imply that he died at the end of the seven years, but that he died either then or at some other period during the seven years. *State* v *Moore*, 160
3. Under the Statute of 1826, Rev. Stat. ch. 65, sec. 14, the presumption of the payment or satisfaction of a judgment does not arise, until ten years after the plaintiff has ceased to prosecute his judgment, that is, until ten years after the day of the return of his last execution. *Butts* v *Patton*, 262
4. It is established, as a general proposition, that from a long and peaceable possession of land, upon a claim of the right, a presumption arises, that the possession was rightful, and therefore was under such grant, deeds and assurances, as are necessary to impart to it that character. *Bullard* v *Barksdale*, 461
5. The presumption is not deduced as an inference of fact from the possession, as evidence merely and according to its influence on the minds of the jury, in producing, or failing to produce, a conviction, that the presumption is according to the truth, but the deduction is made, without regard to the very fact, by a rule in the law of evidence. *Ibid.*
6. The force of this presumption is not destroyed or in any degree repelled by evidence, which renders it probable, that, in truth, a grant was issued. *Ibid.*
7. The grant is presumed, not because the jury believed that one issued, but because there is no proof, that it did not issue; indeed, in the nature of things, it would seem, that there can be no sufficient negative proof of the kind supposed. *Ibid.*

8. Where a long possession, under a claim of title by a grant, as in this case of forty-five years, has been proved, and to rebut the presumption it was shewn that the party so claiming was unable to produce a grant, declared his belief that it never existed, and made efforts to obtain another grant; the Court ought not to have submitted to the jury, upon this evidence, to find whether there was a grant or not, but should have instructed them, that, from the possession alleged, they should presume a grant, and, as matter of law, that there was no evidence to oppose and repel the presumption. *Ibid.*

REWARD.

1. Where an action is brought by a plaintiff to recover the amount of a reward, offered by the defendant, for the apprehension and delivery in jail of an individual charged with a criminal offence, it is incumbent on the plaintiff to prove that he either compelled the individual by force, or induced him by persuasion, to make the surrender.—*Currie* v *Swindall*, 361
2. If the surrender of such individual was wholly voluntary, although the plaintiff accompanied him to the jail and saw him lodged there, he has no right of action. *Ibid.*
3. Where an agent is authorized to offer a reward for the apprehension of an individual, it is only necessary to prove that this was done—the mode of doing it is entirely immaterial.—*Ibid.*

ROADS.

1. When a petition is filed to discontinue an old road between certain points and establish a new one between the same points, and the petition is opposed, and the Court, upon the hearing, refuse to discontinue the old road and establish a new road as prayed for, but direct another road to be opened, passing over only a part of the route prayed for by the petitioners; *Held*, that the defendants were entitled to recover their costs. *Davis* v *Hill*, 9
2. An overseer, of a public road has no right, at his discretion, to widen the road. This can only be done by a jury under the direction of the County Court. *Small* v *Eason* 94
3. If the weather is so bad, as to prevent an overseer from working on the road, or to render unavailing any work he might do, he ought to be excused. *State* v *Small*, 571
4. Where a charter has been granted for a turnpike road

and the road opened, the County Court has no right to convert it into a public road, unless the charter has been duly surrendered, or, from a *non-user* for twenty years, a dedication to the public may be presumed. *State* v *Johnson*, 647

5. Even in such case the road can only be made a public road in the manner prescribed by the Act of Assembly. The mere appointment of an overseer will not be sufficient for that purpose. *Ibid.*

SEE EVIDENCE.

SALES.

Property passes by a sale and delivery, notwithstanding an *executory* agreement to sell to another, and the receipt of a part of the price. *Wilson* v *Purcell*, 502

SEE AGENT AND PRINCIPAL.

SET OFF.

1. It is the settled law in this State, that a debt, due by an assignor of a bond or note at the date of the assignment, may be pleaded, as a set off to an action by an assignee after maturity; but this departure from the Statute, Rev. Stat. ch. 31, sec. 80, is put on the ground, that a liberal construction is necessary to prevent evasion and injustice. *Wharton* v *Hopkins*, 505

2. Where it is shewn this injustice will not result, the rule is different. As when the assignor, at the date of the assignment, had an account against the defendant in the action, larger in amount than that which is attempted to be set off. *Held*, that the defendant could not avail himself of his account, as a set off, in an action by an assignee, on a note or bond assigned after maturity. *Ibid.*

SHERIFFS.

1. The sureties on the official bond of the sheriff are not liable for a trespass committed by him under color of his office. *State* v *Brown*, 141

2. A sheriff cannot be made responsible for the acts of a constable, who sometimes acted as his deputy but never without a special deputation, and who has committed a trespass by levying a void attachment, unless it can be shewn that he was expressly authorized by the sheriff to levy such attachment. *Patterson* v *Britt*, 383

3. Much less can he be responsible, when the constable returns the attachment levied by him *as constable*, although by an order of Court the return is permitted to be amended by stating the levy to have been made by *the sheriff* by the said constable as his deputy, the sheriff's office having then expired and the

order of amendment having been appealed from. *Ibid.*

SLANDER.

1. In an action of slander, when the charge is made by using a cant phrase or a nickname, or when advantage is taken of the fact, known to the persons spoken to, in order to convey a meaning, which they understood by connecting the words (of themselves unmeaning) with such fact, the plaintiff is obliged to make an averment of the meaning of such cant phrases or nickname, or of the existence of such collateral fact, for the purpose of giving point to the words and of shewing that the defendant meant to make the charge complained of; and, in such cases, there must also be an averment, that the words were so understood by the persons to whom they were addressed. *Briggs* v *Byrd,* 353
2. These averments are traversable and must be proven, and differ entirely from what are called innendoes, which need no proof. *Ibid.*

SEE EVIDENCE.

SLAVES.

SEE LEGACIES.

SURETY AND PRINCIPAL.

A surety, who has paid money for his principal, cannot sue him in an action of *tort. Ledbetter* v *Torney,* 294

SEE SHERIFFS.

TAXES.

1. In this State, land is taxed according to its fee simple value, and whoever is owner of the land for the time being is bound to pay the tax: as if an estate is limited to A. for life or for ten years, remainder to B. and his heirs, the valuation is assessed, without reference to this division, and each must pay the tax, during the time that he is the owner and enjoys the possession and pernancy of the profits. *Willard* v *Blount,* 624
2. It is otherwise in the case of landlord and tenant, *where rent is reserved,* for the rent is in lieu of the land, and the landlord is *in the pernancy of the profits of the land:* and if the tenant is compelled to pay the tax, he may recover from the landlord, or deduct the amount out of the rent. *Ibid.*

TRESPASS.

Under the act of 1840, ch. 37, which gives to a tenant, the rent to be paid in a part of the crop, a certain interest in the crop raised; if the tenant remains in possession until an execution against him is levied on the whole of the crop, al-

though the landlord *may* have a special action on the case against the officer levying, yet he cannot maintain an action of trespass, for he has neither the possession nor the property. *Peebles* v *Lassiter*, 93

TRESPASS FOR MESNE PROFITS.

See Ejectment.

TRESPASS Q. C. F.

1. The action of trespass *quare clausum fregit* is a remedy for an injury to the possession, and therefore cannot be maintained by one who had not the possession, at the time the injury was alleged to have been committed. *Patterson* v *Bodenhammer*, 4
2. Tenants in common may, in general, sue separately for trespasses on real estate, yet they may also join in such action, in respect to the injury being to their joint possession. *Camp* v *Holmesly*, 211
3. A. and B. being infants and tenants in common of a tract of land, C. their mother, who was the administratrix of their deceased father, rented out the land to D. who entered into possession of it. The infants afterwards brought a bill in Equity against C. for an account of their estate and charged her with having acted as their guardian in renting out the land, and obtained a decree for the amount ascertained to be due, including the rent; but it did not appear that the decree had been satisfied. *Held*, that D. not being a party to these proceedings in Equity, nor a privy to either of the parties, could not avail himself of them, so as to prevent his being sued as a trespasser. *Hardy* v *Williams*, 499

TROVER.

1. To sustain the action of trover, the right of property in the thing claimed and of possession, at the time of the alleged conversion, must be vested in the plaintiff. *Brazier* v *Ansley*, 12
2. In an action of trover, except for a mere temporary conversion, the plaintiff recovers the value of the property recovered, and, therefore, to entitle him to recover, he must show title and a possession, or a present right of possession. *Barwick* v *Barwick*, 80
3. A negro slave was permitted by his master to own a horse. Afterwards the negro was sold to A., and the horse was taken to the latter's house. A. directed the negro to take the horse away, and he was accordingly given to the negro's son, who was the slave of B. B. set up no claim to the horse and the slave sold

him to another person *Held*, that A. could support no action against B. for the value of the horse. *Francis* v *Welch*, 215

5. A judgment, either before a magistrate or in a court of record, is not the subject of an action of trover and conversion; nor is a note, on which a judgment has been obtained, because it is merged in the judgment and is defunct. *Platt* v *Potts*, 266

5. Trover will lie for promissory notes, by the administrator of the payee, against a donee by oral gift, though the gift be accompanied by delivery. *Brickhouse* v *Brickhouse*, 404

6. A recovery in trover for a note or bill and payment of the damages divest the property out of the plaintiff, and, indeed, vest it in the defendant, as between him and the plaintiff.—*Ibid.*

7. A conversion, to subject a defendant in an action of trover, consists either in an appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff, under a claim of right, inconsistent with his own. *Glover* v *Reddick*, 582

8. Giving to a negro a certificate that he is free, does not amount to a conversion in the person giving the certificate, if the negro should turn out to be a slave. *Ibid.*

TURNPIKE COMPANY.

The true construction of the Act of Assembly, incorporating the Hickory Nut Turnpike Company, is, that the State road, where it crosses the Blue Ridge at Hickory Nut Gap, is not abrogated by the said charter, but is to be continued and kept in repair by the road overseers in their respective counties, until the turnpike is completed, and that the company, for the purpose of constructing the turnpike, has the privilege, when it is located along the State road, to enter upon it, and obstruct it, when, where, and as long as is reasonably necessary, to enable them to make their improvements, and, when it is located near the State road, the same privilege is conferred, to be exercised in a reasonable manner, in referrence to the interest of the Company and the convenience of the public, the latter being made, for a reasonable time, to give place to the former. *Adams* v *Hick. Nut Gap Turnpike Co.*, 486

USURY.

See Interest.

VENDOR AND VENDEE.

1. In general, a vendor of land is bound to prepare the conveyance and tender it or offer to do so, but where, from the nature of the contract it appears that those, to whom the title was to be made, were unknown to the vendor, but known to him who made the purchase, the latter is bound to give the necessary information to the vendor, or, if he fails, to pay the price contracted for.—*Christian* v *Nixon*, 1

2. A vendee, by contract for the sale of a tract of land, can maintain an action upon the bond for title, without having made a payment or tender of the whole of the purchase money, when, by a sale of the property, it is put out of the power of the vendor to make the conveyance, at the time the vendee has a right to call for it. *Nichols* v *Freeman*, 99

3. And it makes no difference, whether the vendor himself has made the conveyance, or whether it has been made by a sheriff under process of law. *Ibid.*

4. In such a case, the measure of damage is the difference between the real value of the property at the time of the breach, and the amount of the purchase money, remaining unpaid. *Ibid.*

See Contract—Warranty.

VENDEE.

See Auction.

WARRANT.

See Justices.

WARRANTY.

1. No warranty of quality is *implied* in the sale of goods. *Dickson* v *Jordan*, 166

1. If a vendor sells articles, apparently of the kind ordered by the vendee, though the vendee has no opportunity of testing the quality, until after he has used them, yet, if there be no fraud on the part of the vendor, the purchaser mus bear the loss, if it turns out that there is a defect in the articles.—*Ibid.*

3. One may recover in an action of covenant or assumpsit, on a bill of sale for a slave, for a warranty of the soundness of the slave, although there be no witness to the bill of sale. *Maxwell* v *Miller*, 272

See Action on the Case.

WILLS.

1. In a controversy respecting the probate of a will, any person who is entitled in interest, may become an actor. The course is to state on the record such matter as shews on which side the person becomes an actor, so as to shew dis-

tinctly, whether he may in the result be entitled to or liable for the costs. *Benjamin* v *Teel*, 49

2. A person, named as executor, is not competent as an attesting witness to a will of personalty. Nor will his subsequent renunciation and release make him so. He must be disinterested at the time of attestation. *Morton* v *Ingram*, 368

3. In order to satisfy that part of the law, which requires the attestation of subscribing witnesses to a will to be *in the presence* of the testator, it is sufficient if the attestation be in the same room in which he is, provided it be not done in a clandestine, fraudulent way, which would not be in the party's presence.—*Bynum* v *Bynum*, 632

4. Where two persons agree to make mutual wills, it *would seem*, that bad faith in the one, either in not making his will or in concealing it after it was made, will not prevent the probate of the will of the other party. *Ibid.*

WITNESSES.

See Costs.